TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 100.

LAUREL HILL CEMETERY, PLAINTIFF IN ERROR,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MARCH 12, 1908.

(21,064.)

(21,064.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 314.

LAUREL HILL CEMETERY, PLAINTIFF IN ERROR,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1909.

1 UNITED STATES OF AMERICA, ss.

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of California before you or some of you, being the highest court of law or equity of the said State, in which a decision could be had in that certain suit between Laurel Hill Cemetery, an Association, Plaintiff and Plaintiff in Error and City and County of San Francisco, Board of Supervisors of the City and County of San Francisco, James D. Phelan, Mayor of the City and County of San Francisco, and James P. Booth, Chas. Boxton, Henry U. Brandenstein, A Compte, Jr., John Connor, Peter J. Curtis, A. A. D'Ancona, Victor D. Dubose, L. J. Dwyer, M. J. Fontana, John E. A. Helms, Richard M. Hotaling, Thos. Jennings, A. B. Maguire, William N. McCarthy, Charles Wesley Reed, George R. Sanderson, and Joseph S. Tobin, members of and constituting the Board of Supervisors of the City and County of San Francisco, Defendants and Defendants in Error, wherein was drawn in question the validity of a statute, or an authority exercised under said State, to wit: an ordinance of the City and County of San Francisco, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of the validity of said statute; and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege or immunity specially set up and claimed under such clause

2 of the said constitution; a manifest error hath happened to the great damage of the said Laurel Hill Cemetery, an Association, as by its complaint appears.

We being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington, in the District of Columbia on the 13th day of April next in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States this 15th day of February A. D. 1908.

[Seal U. S. Circuit Court Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court,
Northern District of California.

Allowed by
W. H. BEATTY,
Chief Justice of the Supreme
Court of the State of California.

3 [Endorsed:] In the Supreme Court of the United States. Laurel Hill Cemetery, an Association, Plaintiff and Plaintiff in Error, *vs.* City and County of San Francisco *et al.*, Defendants and Defendants in Error. Writ of Error. Filed Feb. 19, 1908. F. L. Caughey, Clerk. By Erb, Deputy. Reuben H. Lloyd, Atty. for Petitioner. Chronicle Bldg., S. F.

Service of the within Writ of Error and receipt of a copy thereof is hereby admitted this 18th day of February, 1908.

PERCY V. LONG,
City Attorney,
LONG AND PARTRIDGE,
Of Counsel,
Attorneys for Defendants and Defendants in Error.

4 In the Supreme Court of the State of California.

S. F., No. 3855.

LAUREL HILL CEMETERY, an Association, Plaintiff and Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, JAMES D. PHELAN, Mayor of the City and County of San Francisco, and JAMES P. BOOTH, CHAS. BOXTON, HENRY U. BRANDENSTEIN, A. COMPTE, JR., JOHN CONNOR, PETER J. CURTIS, A. A. D'ANCONA, VICTOR D. DUBOCE, L. J. DWYER, M. J. FONTANA, JOHN E. A. HELMS, RICHARD M. HOTALING, THOS. JENNINGS, A. B. MAGUIRE, WILLIAM N. MCCARTHY, CHARLES WESLEY REED, GEORGE R. SANDERSON, and JOSEPH S. TOBIN, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, Defendants and Defendants in Error.

Citation.

To City and County of San Francisco, Board of Supervisors of the City and County of San Francisco, James D. Phelan, Mayor of the City and County of San Francisco, and James P. Booth, Chas. Boxton, Henry U. Brandenstein, A. Compte, Jr., John Connor, Peter J. Curtis, A. A. D'Ancona, Victor D. Duboce, L. J. Dwyer, M. J. Fontana, John E. A. Helms, Richard M. Hotaling, Thos. Jennings, A. B. Maguire, William N. McCarthy, Charles Wesley Reed, George R. Sanderson, and Joseph S. Tobin, members of and constituting the Board of Supervisors of the City and County of San Francisco, Greeting:

5 You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, in the District of Columbia, within sixty (60) days from the date hereof, pursuant to the Writ of Error filed in the Clerk's office of the Supreme Court of the State of California,

wherein Laurel Hill Cemetery, an Association, is Plaintiff and Plaintiff in Error in this action and you are Defendants and Defendants in Error in said Action, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error as in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California this 13th day of February, A. D. 1908 and of the independence of the United States the one hundred and thirty-second.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

6 [Endorsed:] S. F. No. 3855. In the Supreme Court of the State of California. Laurel Hill Cemetery, an Association, Plaintiff and Plaintiff in Error, *vs.* City and County of San Francisco, *et al.*, Defendants and Defendants in Error. Citation. Filed Feb. 14, 1908. F. L. Caughey, Clerk, By Erb, Deputy. Reuben H. Lloyd, Att'y for Petitioner, Chronicle Bldg., S. F.

Service of the within Citation and receipt of a copy thereof, is hereby admitted this 18th day of February, 1908.

PERCY V. LONG,
City Attorney,
LONG AND PARTRIDGE,
Of Counsel
Attorneys for Defendants and Defendants in Error.

7 In the Supreme Court of the State of California.

S. F. No. 3855.

LAUREL HILL CEMETERY, an Association, Plaintiff and Plaintiff in Error,
vs.
CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, JAMES D. PHELAN, Mayor of the City and County of San Francisco, and JAMES P. BOOTH, CHAS. BOXTON, HENRY U. BRANDENSTEIN, A. COMPTE, JR., JOHN CONNOR, PETER J. CURTIS, A. A. D'ANCONA, VICTOR D. DUBOCE, L. J. DWYER, M. J. FONTANA, JOHN E. A. HELMS, RICHARD M. HOTALING, THOS. JENNINGS, A. B. MAGUIRE, WILLIAM N. MCCARTHY, CHARLES WESLY REED, GEORGE R. SANDERSON, and JOSEPH S. TOBIN, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, Defendants and Defendants in Error.

Order Allowing Writ of Error.

Upon reading and filing the Petition for Writ of Error and Assignment of Errors filed herewith, it is ordered that a Writ of Error

as prayed for be and the same is hereby allowed to have reviewed in the United States Supreme Court the Judgment heretofore entered herein, and that the amount of bond on said Writ of Error be and the same is hereby fixed at the sum of Five Hundred (500) Dollars.

Dated this 8th day of February, 1908.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Order allowing Writ of Error in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 20th day of February, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

8 In the Supreme Court of the State of California.

S. F., No. 3855.

LAUREL HILL CEMETERY, an Association, Plaintiff and Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, JAMES D. PHELAN, Mayor of the City and County of San Francisco, and JAMES P. BOOTH, CHAS. BOXTON, HENRY U. BRANDENSTEIN, A. COMPTE, JR., JOHN CONNOR, PETER J. CURTIS, A. A. D'ANCONA, VICTOR D. DUBOCE, L. J. DWYER, M. J. FONTANA, JOHN E. A. HELMS, RICHARD M. HOTALING, THOS. JENNINGS, A. B. MAGUIRE, WILLIAM N. McCARTHY, CHARLES WESLEY REED, GEORGE R. SANDERSON, and JOSEPH S. TOBIN, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, Defendants and Defendants in Error.

Assignment of Errors.

Laurel Hill Cemetery, an Association, having petitioned the honorable Chief Justice of the Supreme Court of the State of California for an order permitting it to prosecute a Writ of Error to the Honorable Supreme Court of the United States from the final judgment made and entered in the said cause by the Supreme Court of the State of California, now makes and presents and files the following Assignment of Errors herein, and says that in the record and proceedings in the above entitled action there is manifest error in this to wit:

I.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was valid as to the rights of the said Plaintiff in Error, Laurel Hill Cemetery, an Association, acquired before the passage of said Ordinance.

II.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the Ordinance adopted by the Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was a valid police regulation lawfully adopted by the Board of Supervisors of the City and County of San Francisco, State of California, in the lawful exercise of the police power granted to the said City and County of San Francisco by the Constitution and Statutes of said State of California.

III.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the Ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was not contrary to and in violation and in derogation of the provisions of Section 8 of Article 1 of the Constitution of the United States in that it is a municipal law impairing the obligation of a contract.

IV.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was not contrary to and in violation and in derogation of the Fourteenth Amendment to the Constitution of the United States in that it deprives the Plaintiff of its property without due process of law and that it deprives the various lot owners in the Cemetery of the Plaintiff of their property without due process of law.

V.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco,

State of California, on March 26, 1900, entitled "Ordinance No. 25, Prohibiting the burial of the dead within the City and County of San Francisco" was not an invalid ordinance as an unwarranted interference with the property rights of the said Plaintiff in Error acquired prior to the adoption of said ordinance, and as an impairment of the obligation of contracts made before the passage of said ordinance.

VI.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25, Prohibiting the burial of the dead within the City and County of San Francisco" was not an invalid ordinance as abridging the privileges and immunities of the said Plaintiff in Error and depriving it of its property acquired prior to the adoption of said Ordinance without due process of law.

11

VII.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that said Court can take judicial notice that the Cemetery of Plaintiff in Error is likely to cause injury or to prove dangerous to the health of the population surrounding the same.

VIII.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the Defendants were not estopped from preventing the use of the premises of Plaintiff in Error for the purposes of interment of the dead therein; and from enforcing the provisions of that certain ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25, Prohibiting the burial of the dead within the City and County of San Francisco."

IX.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled Ordinance No. 25, Prohibiting the burial of the dead within the City and County of San Francisco" was not an arbitrary and unreasonable exercise by said Board of Supervisors of the police power vested in it by the constitution and statutes of the State of California.

X.

By the record herein it appears that the Superior Court of the State of California in and for the City and County of San Francisco erred in granting the motion of the Defendants herein for

judgment upon the pleadings in said action and in entering
12 judgment upon the pleadings without an opportunity being given the plaintiff to present evidence in support of the allegations of its complaint.

XI.

By the record herein it appears that the Supreme Court of the State of California erred in affirming the judgment of the said Superior Court rendered upon the motion of Defendants for judgment upon the pleadings in said action.

XII.

By the record herein it appears that the Supreme Court of the State of California erred in not determining that the Plaintiff in Error was entitled to relief in a Court of Equity enjoining the Defendants in Error from enforcing the aforesaid ordinance.

XIII.

By the record herein it appears that the Supreme Court of the State of California erred in giving judgment for the Defendants in this action and against the Plaintiff therein.

XIV.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25, Prohibiting the burial of the dead within the City and County of San Francisco" was a valid and constitutional ordinance whereas said decision ought to have been against the validity of said ordinance and that ordinance was repugnant to the Constitution of the United States and void.

Said plaintiff in error prays that the judgment and decision of the Supreme Court of the State of California may be reversed, annulled and altogether held for nought and that the said Court
13 be directed to reverse the decision of the said Superior Court of the State of California in and for the City and County of San Francisco, and that the Plaintiff in Error have such other and further relief as it may be entitled to.

R. H. LLOYD,
Attorney for Laurel Hill Cemetery Association, Plaintiff in Error.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Assignment of Errors in S. F. No. 3855 in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court this 20th day of February, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

14 In the Supreme Court of the State of California.

S. F., No. 3855.

LAUREL HILL CEMETERY, an Association, Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, JAMES D. PHELAN, Mayor of the City and County of San Francisco, and JAMES P. BOOTH, CHAS. BOXTON, HENRY U. BRANDENSTEIN, A. COMPTE, JR., JOHN CONNOR, PETER J. CURTIS, A. A. D'ANCONA, VICTOR D. DUBOCE, L. J. DWYER, M. J. FONTANA, JOHN E. A. HELMS, RICHARD M. HOTALING, THOS. JENNINGS, A. B. MAGUIRE, WILLIAM N. MCCARTHY, CHARLES WESLY REED, GEORGE R. SANDERSON, and JOSEPH S. TOBIN, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, Defendants.

Petition for Writ of Error.

To the Honorable William H. Beatty, Chief Justice of the Supreme Court of the State of California:

The Petition of Laurel Hill Cemetery, an Association, incorporated under the laws of the State of California, respectfully shows:

Heretofore and on May 24, 1900, your Petitioner brought its action in the Superior Court of the State of California in and for the City and County of San Francisco against said City and County of San Francisco, Board of Supervisors of the City and County of San Francisco, James D. Phelan, Mayor of the City and County of San Francisco, and James P. Booth, Charles Boxton, Henry U.
15 Brandenstein, A. Compte, Jr., John Connor, Peter J. Curtis, A. A. D'Ancona, Victor D. Duboce, L. J. Dwyer, M. J. Fontana, John E. A. Helms, Richard M. Hotaling, Thos. Jennings, A. B. Maguire, William N. McCarthy, Charles Wesley Reed, George R. Sanderson, and Joseph S. Tobin, members of and constituting the Board of Supervisors of the City and County of San Francisco, as Defendants, in and by which action your petitioner sought to obtain a decree of said Court adjudging that a certain ordinance theretofore passed and adopted by the Board of Supervisors of the said County of San Francisco, State of California entitled "Ordinance Number 25. Prohibiting the burial of the dead within the City and County of San Francisco" was void as being in violation of the provisions of the Constitution of the United States.

Thereafter and on November 13, 1903, a judgment was duly given, made and rendered in and by the said Superior Court in the aforesaid action in favor of the Defendants in said action and against your petitioner as Plaintiff therein, in and by which judgment it was decreed by said Superior Court of the State of California in and for the City and County of San Francisco that the aforesaid ordinance was valid and not in violation of the provisions of the Consti-

tution of the United States. Said judgment was rendered upon the pleadings in said action, upon motion of the defendants made in that behalf, and without opportunity to your petitioner to present any evidence in support of the allegations of its complaint.

Thereafter your Petitioner perfected an appeal from the aforesaid judgment to the Supreme Court of the State of California, and thereafter the said cause was heard by the said Supreme Court sitting in bank; and on the 4th day of December, A. D. 1907, the judgment of said Supreme of the State of California was rendered and entered in said cause in and by which the aforesaid judgment of the said Superior Court was affirmed.

The said last named judgment of the said Supreme Court of the State of California has become and is final. Said Supreme Court of the State of California is the highest Court of said State in
16 which a decision in said suit could be had.

Your Petitioner desires that the aforesaid Judgment of the said Supreme Court of the State of California be reexamined in the Supreme Court of the United States upon a Writ of Error; and herein shows that in said action so pending in the aforesaid Superior Court of the State of California in and for the City and County of San Francisco and in said Supreme Court of the State of California there was drawn in question the validity of the aforesaid statute of the State of California and of the Board of Supervisors of said City and County of San Francisco, within said state, on the ground of the same being repugnant to the Constitution of the United States, in that said statute was a municipal law impairing the obligation of a contract, and that said statute deprived your petitioner of its property without due process of law, and the decisions of each of said Courts was in favor of the validity of said state statute.

And your Petitioner further shows that in the aforesaid action your Petitioner specially set up and claimed rights, privileges and immunities under the constitution of the United States and the decision of each of the said Courts was against such right, privilege and immunity so set up and claimed.

All of which will more fully appear by the record of the proceedings in the said action, which record is herewith submitted and the same is hereby specially referred to.

Wherefore your Petitioner prays that a Writ of Error be allowed returnable to the Supreme Court of the United States and that an order be made fixing the amount of bond to be given by your Petitioner, and that a citation be issued as provided by law; and such other process be allowed as will enable your Petitioner to obtain a review of the said case of Laurel Hill Cemetery, an Association, Plaintiff and Plaintiff in Error, against the City and County of San Francisco, *et al.*, Defendants and Defendants in Error; and the correction of the error aforesaid committed by the Supreme
17 Court of the State of California and for such other and further orders as may be proper.

And your Petitioner will ever pray.

R. H. LLOYD,
Attorney for Petitioner.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Petition for Writ of Error S. F. No. 3855, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 20th day of February, A. D. 1908.

[Seal of the Supreme Court of California.]

F. L. CAUGHEY, *Clerk*,
By I. ERB, *Deputy Clerk*.

18 In the Supreme Court of the State of California.

S. F., No. 3855.

LAUREL HILL CEMETERY, an Association, Plaintiff and Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, JAMES D. PHELAN, Mayor of the City and County of San Francisco, and JAMES P. BOOTH, CHAS. BOXTON, HENRY U. BRANDENSTEIN, A. COMPTE, JR., JOHN CONNOR, PETER J. CURTIS, A. A. D'ANCONA, VICTOR D. DUBOCE, L. J. DWYER, M. J. FONTANA, JOHN E. A. HELMS, RICHARD M. HOTALING, THOS. JENNINGS, A. B. MAGUIRE, WILLIAM N. MCCARTHY, CHARLES WESLEY REED, GEORGE R. SANDERSON, and JOSEPH S. TOBIN, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, Defendants and Defendants in Error.

Bond on Application for Writ of Error.

Know all men by these presents: That we, Laurel Hill Cemetery, an Association, as Principal, and —— as Sureties are held and firmly bound unto the said Defendants, City and County of San Francisco, Board of Supervisors of the City and County of San Francisco, James D. Phelan, Mayor of the City and County of San Francisco, and James P. Booth, Chas. Boxton, Henry U. Brandenstein, A. Compte, Jr., John Connor, Peter J. Curtis, A. A. D'Ancona, Victor D. Duboce, L. J. Dwyer, M. J. Fontana, John E. A. Helms, Richard M. Hotaling, Thos. Jennings, A. B. Maguire, William N. McCarthy, Charles Wesley Reed, George R. Sanderson, and Joseph S. Tobin, mem-
19 bers of and constituting the Board of Supervisors of the City and County of San Francisco, for the full and just sum of Five Hundred (500) Dollars to be paid to the said Defendants, their attorneys or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this — day of —— A. D. 1908.

Whereas lately at a session of the Supreme Court of the State of California in a suit pending in said Court between the said Laurel

Hill Cemetery, an Association, Plaintiff and Plaintiff in Error and the said City and County of San Francisco, Board of Supervisors of the City and County of San Francisco, James D. Phelan, Mayor of the City and County of San Francisco, and James P. Booth, Chas. Boxton, Henry U. Brandenstein, A. Compte, Jr., John Connor, Peter J. Curtis, A. A. D'Ancona, Victor D. Duboce, L. J. Dwyer, M. J. Fontana, John E. A. Helms, Richard M. Hotaling, Thos. Jennings, A. B. Maguire, William N. McCarthy, Charles Wesley Reed, George R. Sanderson, and Joseph S. Tobin, members of and constituting the Board of Supervisors of the City and County of San Francisco, Defendants and Defendants in Error, a final judgment was rendered against the said Plaintiff Laurel Hill Cemetery, an Association, and the said Laurel Hill Cemetery, an Association, having obtained from the said Court a Writ of Error to reverse the judgment in the aforesaid suit, and a citation directed to the said Defendants is about to be issued citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia.

Now the condition of the above obligation is such that if the said Laurel Hill Cemetery, an Association, shall prosecute its Writ of Error to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

LAUREL HILL CEMETERY. [SEAL.]
By CHAS. H. GRAY,
By WALLACE EVERSON, *President.*
A. P. REDDING, *Secretary.*

[SEAL.] CHAS. H. CROWELL, *Sec'y.*

The foregoing and within bond is hereby approved, this 13th of February, 1908.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Bond on application for Writ of Error in S. F. No. 3855 in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 20th day of February, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

21 STATE OF CALIFORNIA,
City and County of

Personally appeared before me,
of February, A. D. 1908, known
Pacific Surety Company, the cor
executed the annexed bond of ——
by me duly sworn, deposes and sa
in the State of California; that he
Surety Company, and knows the
Company is duly and legally in
State of California; that said Co
visions of the Act of Congress of
tain corporations to be accepted
affixed to the annexed bond is th
Surety Company, and was there
of the Board of Directors of said
name thereto by like order and a
pany; and that he is acquainted
him to be the President of said
of said Wallace Everson subscrib
handwriting of said Wallace Eve
order and authority of said Boar
of said deponent; and that the ass
and liable to execution, exceed i
every nature whatsoever, by more
Fifty Thousand ($250,000.00) D

Sworn to, acknowledged befor
ence, this 12th day of February,
[CORPORATE SEAL.] CI
Notary

My commission expires April

22 In the Supreme Court

S. F.,

LAUREL HILL CEMETERY, an A

CITY AND COUNTY OF SAN FR
Respo

Transcript on App

Lloyd & Wood, Haven & H
Appellants.
Percy V. Long, City Attorne
McEnerney, Attorneys for Defe

Filed this — day of ——, A.

23 In the Supreme Court of the State of California.

LAUREL HILL CEMETERY (an Association), Appellant,
vs.
CITY AND COUNTY OF SAN FRANCISCO ET AL., Respondents.

TRANSCRIPT ON APPEAL.

Complaint as Amended.

In the Superior Court of the City and County of San Francisco, State of California.

No. 72456. Dept. No. 4.

LAUREL HILL CEMETERY, an Association, Plaintiff,
vs.
CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, JAMES D. PHELAN, Mayor of the City and County of San Francisco, and JAMES P. BOOTH, CHAS. BOXTON, HENRY U. BRANDENSTEIN, A. COMTE, JR., JOHN CONNOR, PETER J. CURTIS, A. A. D'ANCONA, VICTOR D. DUBOCE, L. J. DWYER, M. J. FONTANA, JOHN E. A. HELMS, RICHARD M. HOTALING, THOS. JENNINGS, A. B. MAGUIRE, WILLIAM N. MCCARTHY, CHARLES WESLEY REED, GEORGE R. SANDERSON, and JOSEPH S. TOBIN, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, Defendants.

24 Plaintiff complains of the above-named defendants and alleges:

I.

That heretofore, and at the tenth session thereof, the Legislature of the State of California passed an Act which was approved by the Governor of said State on April 18, 1859, and entitled "An Act authorizing the incorporation of Rural Cemetery Associations," and therein and thereby, amongst other things, enacted that any number of persons residing in said State, not less than seven, who should desire to form an association for the purpose of procuring and holding lands, to be used exclusively for a cemetery or place for the burial of the dead, might meet at such time and place as they, or a majority of them, might agree, and appoint a Chairman or Secretary by a vote of the majority of the persons present at the meeting and proceed to form an association. And it was in said Act further provided that a certificate stating the names of the associates determined upon by a majority of the persons who met, the number of Trustees fixed on to manage the concerns of the Association, the names of the Trustees chosen at the meeting and their classification,

and the day fixed for the annual election of Trustees, should
25 be made within three days after such meeting by the Chairman and Secretary thereof, and acknowledged by them before an officer authorized to take proof of acknowledgments *of proofs* and conveyances in the county where such meeting should be held, and caused by them to be filed and recorded in the office of the County Clerk of the county in which the cemetery grounds are situated in a book to be appropriated to the recording of the certificates of incorporation.

And it was in said Act further enacted that upon such certificate, duly acknowledged and filed as aforesaid, being recorded, the Association mentioned therein should be deemed legally incorporated and should be a body politic and corporate in fact and in name, by the name stated in the certificate, and by their corporate name have succession and power:

"First. "To sue and be sued in any Court.

Second. To make and use a common seal, and alter the same at pleasure.

Third. To purchase, hold, sell and convey such real and personal estate as the purposes of the incorporation shall require.

Fourth. To appoint such officers, agents, and servants, as the business of the Corporation shall require, to define their powers, prescribe their duties, and fix their compensation.

Fifth. To require of them such security as may be thought
26 proper for the fulfilment of their duties, and to remove them at will, except that no Trustee shall be removed from office unless by a vote of two-thirds of the whole number of Trustees, or by a vote of a majority of the Trustees, on a written request, signed by one-half of the lot-owners.

Sixth. To make by-laws not inconsistent with the laws of this State, for the organization of the Company, the management of the property, regulation of its affairs, and for carrying on all kinds of business within the object and purposes of the Company. The affairs and property of such Association shall be managed by the Trustees, who shall annually appoint from among their number, a President and Vice-President, and shall also appoint a Secretary and Treasurer, who shall hold their places during the pleasure of the Board of Trustees, and the Trustees may require the Treasurer to give security for the faithful performance of the duties of his office."

That the aforesaid Act of the Legislature of the State of California has never been repealed and is now in full force and effect.

That after the passage of the Act aforesaid, and on the eleventh day of April, 1867, Nicholas Luning, H. M. Newhall, H. S.
27 Gates, Caleb T. Fay, H. H. Haight, C. C. Butler, and Calvin Brown, desiring to form an association for the purpose of procuring and holding lands to be used exclusively for a cemetery or a place for the burial of the dead, met at the City and County of San Francisco, in the State aforesaid, and were present at the meeting then held and participated in all of its proceedings. That at said meeting, H. S. Gates was appointed Chairman, and Calvin

Brown Secretary, by a vote of the majority of the persons present at said meeting, and said persons so present at said meeting, did then and there proceed to form an Association by determining on a corporate name by which the Association should be called and known, and which name, so determined upon, was and is the "Laurel Hill Cemetery," and by determining on the number of Trustees to manage the concerns of the Association, and which number was fixed at nine, and the persons present as aforesaid at said meeting, did proceed to and did elect by ballot the number of Trustees so determined on, and the Chairman and Secretary of said meeting did immediately after such election divide the Trustees by lot into three classes: Those in the first class to hold office for one year;
those in the second class, two years; and those in the third
28 class, three years; and the meeting did then and there also determine on what day in each year the future annual elections of Trustees should be held, and thereupon and on said last named day, the said Chairman and Secretary of said meeting, did make a written certificate and sign their names thereto and acknowledge the same before an officer authorized to take proof and acknowledgments of conveyances in the said County of San Francisco, where such meeting was held, which certificate stated the names of the associates determined upon by a majority of the persons who met, the number of Trustees fixed on to manage the concerns of the Association, the names of the Trustees chosen at the meeting; and thereafter and on said last-mentioned date, the said Chairman and Secretary of such meeting caused the said certificate to be filed and recorded in the office of the County Clerk of the City and County of San Francisco, in which the cemetery grounds of said Association were situated, in a book appropriated to the recording of certificates of incorporation.

That upon such certificate, duly acknowledged and filed as aforesaid, being recorded as hereinbefore alleged, plaintiff, the Association therein named, became and was, since then has been and now
29 is legally incorporated and a body politic and corporate in fact and name, by the name of "Laurel Hill Cemetery," stated in the said certificate, and by its corporate name has succession and power, as in the said Act of the Legislature of the State of California designated, described and declared.

II.

That the defendant, the City and County of San Francisco, is a municipal corporation incorporated, organized and existing, under and by virtue of the Constitution and laws of the State of California.

III.

That ever since the second day of January, 1900, the said City and County of San Francisco has been subject to a charter framed for its government and adopted in pursuance of the provisions of the Constitution of said State; and the defendants, the Board of Supervisors of the City and County of San Francisco, are by said

Charter vested with the legislative power of said City and County; and the defendants, James P. Booth, Chas. Boxton, Henry U. Brandenstein, A. Comte, Jr., John Connor, Peter J. Curtis, A. A. D'Ancona, Victor D. Dubose, L. J. Dwyer, M. J. Fontana, John E. A. Helms, Richard M. Hotaling, Thos. Jennings, A. B. Maguire, William N. McCarthy, Charles Wesley Reed, George R. Sanderson, and Joseph S. Tobin are members of and constitute the said Board of Supervisors.

IV.

That the defendant, James D. Phelan, is Mayor of the said City and County of San Francisco.

V.

And plaintiff further shows that heretofore and during the year 1853, Nathaniel Gray and his associates were co-owners of a tract of land situate, lying and being in the County of San Francisco, and outside of and beyond the corporate limits and boundaries of the City of San Francisco, and described as follows:

Commencing at a point on a hill lying southerly from the Presidio and marked by a cannon placed there by the United States authorities, thence running in a westerly direction along the line claimed by the United States authorities in connection with the Presidio to a point where said line intersects with the easterly line of a claim or rancho known as Morris Rancho, thence in a southerly direction along the said line of the said Morris Rancho to a point where said line meets the northerly line of a rancho known as Chittenden's Rancho, thence easterly along said line of said Chittenden's Rancho to a point where said line meets the westerly line of
31 a rancho known as Hoadley's Rancho, as far as the same extends, and continuing still farther in nearly the same direction to the cannon at the point of commencement aforesaid; containing in all about one hundred and sixty acres.

That at the time aforesaid, to wit, in the month of November, 1853, the said Nathaniel Gray and his associate co-owners concluded and determined to appropriate and devote the said above described tract of land to the purposes of a rural cemetery and a place for the burial of the dead and therein to establish and maintain such cemetery. And thereupon the said Gray and his associates began the work of preparing the said tract of land for the said purposes, and continued to prosecute the said work with diligence. That at the time of the preparation of said land for the purposes aforesaid, its condition was that of its original wilderness, and it was covered with a thick growth of native chaparral and with rocks outcropping from a sandy and sterile soil, and in order to accomplish such purpose it was necessary to clear said lands of the said chaparral and to cut, grade, gravel, and macadamize roads and avenues and to survey, lay out and designate lots and plots, and to do all other work necessary to fit the said lands for the uses
32 to which it was designed to devote the same. And said Gray and his associates continued to prosecute the said work until

the 30th day of May, 1854, when the work thereon had been sufficiently prosecuted to justify the opening of the said cemetery and the reception of bodies for burial therein. And thereupon and on said 30th day of May, 1854, the said lands were publicly dedicated to the purposes aforesaid by the name of the "Lone Mountain Cemetery."

That the said dedication was of such public importance that it was made the occasion of a solemn and impressive ceremony in which a large concourse of the citizens of San Francisco participated. That Hon. C. K. Garrison, Mayor of the City of San Francisco, was present at such dedication and delivered an address in which he gave a history of the enterprise by which the grounds had been laid out and embellished, and made remarks appropriate to the occasion.

That the Hon. E. D. Baker delivered an occasional address. His body was there interred with imposing ceremonies on the 11th of December, 1861, and on the last occasion, after all else had been done, Rev. Thomas Starr King, standing by the unfilled grave, said:

"We have borne him now to the home of the dead, to the
33 cemetery which, after fit services of prayer, he devoted in a tender and thrilling speech to its hallowed purposes."

That the proceedings were opened and closed with prayer, and anthems and odes were sung, and a poem written for the occasion was read by its author, Frank Soule, Esq.

That Rt. Rev. W. Ingraham Kip delivered the dedicatory address, and, in such address, when stating the cause which had induced the assembling of the concourse then present, said:—

"We have gathered here to-day, my friends, to perform a service of solemn interest. We have gathered to dedicate a spot for the repose of the ashes of the dead, and where perhaps we ourselves, still members of this living, breathing world, may one day be laid at rest. We are setting apart a place where the journeyer, wearied with the trials of this world, when the time shall come to lay aside his pilgrim's staff, may lie down to that repose which is to be broken only by the Archangel's trump. Over these valleys and slopes the words of solemn prayer have been spoken which are to consecrate them to the holiest of uses and make them, through all coming time, the treasure house of affection. Beneath the soil on which we stand, the loved and the lost shall be placed and tears shall consecrate the spot, and the mourners and the mourned meet together in this narrow house. We are founding, as it were, a city, which one day shall teem with a population far greater than that which "moves and has
its being" in the busy city of the living from which we have
34 come forth to discharge this duty."

And in concluding such address, the reverend orator publicly declared the dedication of said lands to the purposes for which they were designated and intended by the said Gray and his associates in these words:—

"We dedicate this place then to the memory of the departed. We dedicate it as the spot around which, in coming years, the warm affections of multitudes shall gather when perhaps they themselves are far away, because here their treasures have been left. We dedi-

cate it as the last resting-place of the countless generations who are to come after us until every grass sod is heaving with the dead. We dedicate it as the storehouse into which the great reaper Death is to gather his harvest, year after year, increasing his stores until it becomes rich with the garnered dust of those who had left the earth fragrant with their footsteps. But more than all, we dedicate it as the place which one day is to witness the noblest triumph of our Lord when the gathered thousands shall start from their narrow beds and follow Him up amid the glories of the resurrection."

An anthem was then sung. Rev. F. T. Gray then delivered an address. The doxology was sung and the Rev. W. A. Scott pronounced the benediction.

That the proceedings aforesaid were published in the newspapers of said City of San Francisco at the time of their occurrence,
35 and it was generally known in said city and to the governing bodies and officials thereof, and to the inhabitants therein, that said lands had been set apart, appropriated and dedicated exclusively to the purposes of a cemetery and a place for the burial of the dead, and the Mayor of said City of San Francisco and the officials thereof, and the inhabitants generally therein, united in commending and encouraging the said Gray and his associates in undertaking and prosecuting the enterprise aforesaid.

That at the time of the establishment of said Lone Mountain Cemetery, the same was remote from the business part of said City of San Francisco and distant at least two miles therefrom, and was likewise a very considerable distance, to wit, more than one mile, from any part of said city used for dwellings. That no public streets leading from the business or dwelling part of said city to said cemetery had been opened, paved, planked or macadamized, or otherwise made available for travel in carriage or other vehicles. That the only way open to said cemetery for carriage, or other vehicles was on and along the street or road leading to the Fort or Reservation of the Government of the United States, situate on the shores of the Bay of San Francisco, at or near the entrance thereto from the
36 Pacific Ocean, and known as the Presidio, and thence by a road leading from the highway aforesaid, and running therefrom in a southerly direction to said cemetery, a distance of four miles from said city, and which last-mentioned way or branch road was constructed, kept in repair and used by the associates aforesaid and for the purpose of obtaining access to and egress from the said Lone Mountain Cemetery, at which it stopped and from which it was not extended.

That during the occupation and use of said tract of land by said associates for the purposes of said Lone Mountain Cemetery, they expended large sums of money in laying out, paving, and otherwise improving the avenues and ways running in, through, across, and over the same, and in making access to the lots and plots therein easy and convenient, and many of the purchasers of the lots and plots in said Lone Mountain Cemetery laid out and expended large sums of money in the building of walls about their said lots or plots and monuments, mausoleums and other improvements and adornments

thereon, and in the planting, watering and otherwise caring for grasses, flowers and shrubbery thereon. And at all times up to the conveyance hereinafter mentioned, the said associates and said
37 lot owners continued to work aforesaid, and the said lands were at all times used and at the time of said conveyance were being used exclusively for the purposes of a rural cemetery or place for the burial of the human dead.

That at all times after the establishment of said cemetery and until the conveyance to plaintiff hereinafter mentioned, said Nathaniel Gray and his associates continued to improve and embellish the said cemetery, and to expend large sums of money over and above the receipts for lots sold therein in the said work, and they had at the time of such conveyance paid, laid out and expended in such work, over and above the receipts upwards of one hundred and sixty thousands dollars, and the said Gray and his associates had, between the time of the establishment of said cemetery and the conveyance aforesaid, sold to divers persons a large number of lots and plots in the said cemetery, and aggregating more than three thousand of said lots and plots, and a great number of said lots and plots had been improved and embellished at great expense and outlay of money, and all and every of the said acts were done and said expenditures were made openly and publicly, and it was notoriously known to the said City of San Francisco and to its successor,
38 the City and County of San Francisco, that such work was being done and that said expenditures were being made in the said cemetery and for the purposes aforesaid.

VI.

And plaintiff further alleges that on the 26th day of May, 1868, and after the formation and organization of the plaintiff association, the said Gray and his associates and co-owners of the tract of land aforesaid granted and conveyed to the plaintiff all that part thereof which had been actually appropriated to the purposes of a cemetery, and being the tract, lot or piece of land described as follows:—

Commencing at a point to be ascertained in the following manner: Start from a point at the southeasterly corner of the Government Reserve upon a hill, lying southerly from the Presidio, and heretofore marked by a cannon placed there by the United States authorities, thence running south seventy-seven and one-half (77½) degrees west forty and ninety-three one hundredths (40.93-100) chains, along the south line of said Government Reserve, thence south one-half (½) degree west eleven and eighty-seven one hundredths (11.87-100) chains, then west twelve and sixty-three one hundredths (12.63-100) chains, thence south 958.5 feet more or less, to a point on the south line of California Street extended westwardly in a straight line, which last named point is the point of commencement of the land herein granted; from thence run-
39 ning south seven hundred seventy-one and ten and one-quarter hundredths (771.10¼) feet, thence east thirty-three hundred and eleven and nine-tenths (3311.9) feet, more or less, to the westerly line of Cemetery Avenue; as it shall be ultimately laid

out, and fixed upon the official map of the City and County of San Francisco by the Board of Supervisors thereof, thence northwesterly and along the westerly line of said Cemetery Avenue, twelve hundred and forty-eight (1248) feet, more or less, to the southerly line of California Street, as extended westerly in a straight line, thence westwardly and along the southerly line of California Street as extended, 3164.4 feet, more or less, to the point of beginning. Said tract of land, hereby granted, being that portion of the tract of land known as Lone Mountain Cemetery, lying south of California Street and west of Cemetery Avenue.

That such grant and conveyance was made upon condition that the said grantee should proceed to lay out and divide said lands into cemetery lots and sell the same for cemetery purposes and carry on the usual business of a rural cemetery.

That upon the making and delivery of the said grant, the plaintiff entered into and took possession of the above-described tract of land and thereupon began, and has since continuously and without interruption or cessation continued to carry on and conduct thereat the business of a cemetery, and to sell the said lots and plots
10 for the purposes exclusively of a cemetery, and for the burial therein of the bodies of the dead.

That the last above-described tract of land constituted and comprised that portion of said original tract which had been set apart and used for the purposes of a cemetery and upon the grant and conveyance aforesaid, all that part of said original tract which was not included in said conveyance was appropriated to and used for other purposes and was no longer devoted to the purposes of a cemetery.

That afterwards and on, to wit, the 17th day of May, 1871, the plaintiff made an application to the Board of Supervisors of said City and County of San Francisco for a grant of the tracts of land last above-described, under and in pursuance of an act of the Legislature of the State of California entitled "An Act to expedite the settlement of land titles in the City and County of San Francisco, and to ratify and confirm the acts and proceedings of certain of the authorities thereof," and approved March 14th, 1870, and thereafter and upon a hearing of the said application of the Outside Land Committee of said board and the making of proof by plaintiff, the said committee reported in favor of the granting of said application, and the said report was regularly adopted by said board, and
11 the making and delivery of said grant was duly ordered, and thereupon and on the 23d day of June, 1871 Hon. Thomas H. Selby, the Mayor of said City and County of San Francisco, granted to the plaintiff the tract of land last above-described. That the consideration of said grant was the sum of $24,139.79, and the said sum was at the time of the delivery of said grant paid by the plaintiff to the treasury of said City and County of San Francisco and the said City and County and the said Mayor and Board of Supervisors took and secured said consideration and have since retained and now retain the same with full notice and knowledge of the re-

and purposes to which said land have been devoted and for which they had been and were being used.

That thereafter and on the 29th day of December, 1890, the plaintiff sold from the western side of said tract of land a portion thereof not required for and not in use for burial purposes, and thereby reduced the size of said cemetery and the area of land included within and used for the same to a lot of land described as follows, to-wit:

Commencing at the southwest corner of California Street and Central Avenue, and running thence westerly along California Street twenty-two hundred fifty-seven and 11-12 (2257 11-12) feet
42 and to the east line of Williamson Street; thence southerly and along said Williamson Street nine hundred twenty-three (923) feet to the southerly boundary of Laurel Hill Cemetery; thence along said southerly boundary eighty-nine and 54 (89 54) degrees east, twenty-three hundred sixty-three and 56 (2363 56) feet and to the west line of Central Avenue; thence northerly along said Central Avenue twelve hundred forty-eight and 1-12 (1248 1-12) feet and to the place of beginning.

And the plaintiff has since held, and now holds the said above-described tract of land exclusively for the purposes of a cemetery, and the whole thereof has been so used by and is now included with and constitutes and comprises the cemetery of the plaintiff, and is known and called "Laurel Hill Cemetery."

VII.

And plaintiff further shows and avers that at the time of its entry into the possession of the said lands, its predecessors had sold thereto a large number of lots in all about three thousand in number of the lots and plots in which the said cemetery had been divided, and that under and by the terms of the Act of Legislature of the State of California [illegible] and under and in pursuance whereof the plaintiff was incorporated, it was and is
provided that in case the grounds purchased for cemetery
43 purposes in accordance with the terms of said Act shall have been [illegible] then those who are lot owners at the time of the purchase shall have and be entitled to all the privileges that would be entitled to by purchase from a corporation formed as in said Act provided.

That in and by the provisions of the said Act, it was and is enacted and declared by the legislative authority and power of the State of California, whereon [illegible] and held as in said Act provided, [illegible] for cemeteries or place for the burial of the dead [illegible] [illegible] [illegible] provisions of said Act shall be [illegible] lots or plots, or such lots or plots, or any of them, [illegible] individual holders, and after they shall have been so [illegible] by the [illegible] transferred such lot or plot upon the [illegible] of such enjoyment shall be forever thereafter [illegible] and [illegible] upon the death of the holder or proprietor [illegible] [illegible] at law or of such holder or proprietor and to their heirs at law forever; and the city and by the

enactments and provisions aforesaid, the State of California contracted to and with such lot owners for the perpetual use of such lots and plots for the purposes in the said Act prescribed, and such owners of said lots and plots, and their heirs at law, became and were and now are vested with lawful and inalienable right to such use.

That since the establishment of the said cemetery and its dedication in the year 1854, the plaintiff admits predecessors in an interest have sold and conveyed forty thousand lots or plots; that a large proportion of the lots or plots so sold have been used for the purposes of a burial and one or more interments have been made therein; that very few of said lots or plots have been so filled as to prevent further burials therein, and on the contrary, the very large proportion of said lots and plots are capable of receiving a number of interments in addition to those already made therein.

That the owners, holders and proprietors of said lots and plots in the said cemetery of the plaintiff have since the establishment thereof, and the purchase by them of said lots, acted and relied upon the contract aforesaid, and in reliance upon the faith and credit thereof and fully believing that they would be protected in the uses of their said lots and plots and to be allowed to continue such without let or hindrance, as in said Act, guaranteed, have expended large sums of money upon said lots and plots and in the preparation thereof for the burial of those already interred therein and for those who may hereafter be entitled to such burial. That a great number of monuments, designed and constructed to perpetuate the memory of the members of the family who have been or may be interred in the lot upon which they stand — mausoleums, tombs, and other structures — have been built and erected and now stand upon and below the surface of said lots and plots, designed and intended for the interment of the holders and proprietors of said lots and plots and their heirs at law and other persons who may become entitled to interment therein. That said lots and plots have been made attractive and beautiful by the employment of the highest skill in landscape culture and by architectural adornings of elaborate design and workmanship. That plaintiff is unable to state the exact amount of money which has been expended in the improvement and embellishment of said lots and plots, but it avers upon its information and belief, that the aggregate amount thereof exceeds the sum of two million dollars.

That said improvements are of a lasting and permanent character, and have been made with a view to their permanent and continuous use for the purposes of their construction in the future; and said improvements cannot be removed from said cemetery without great cost, and in many cases, without the total destruction of the same.

That said holders and proprietors of said lots and plots were further induced to make the said expenditures because of the fact that under the provisions of the statute aforesaid, the plaintiff, upon payment of its indebtedness caused by its purchase of the lands in said cemetery, is required to apply all the proceeds arising from the

sales of lots, plots, and graves to the improvement, embellishment, and preservation of said cemetery and to incidental expenses, and to no other purpose or object.

VIII.

And plaintiff further shows and avers that ever since it acquired the lands aforesaid and which now embrace, comprise and include the said Laurel Hill Cemetery, it has constantly expended large sums of money in the improvement and embellishment of the same, and in making the same attractive and convenient for the purposes for which it was designed.

That it has constructed roads, avenues, paths, and way in, through, and across said cemetery, and has graded, paved, macadamized, and otherwise prepared the same for use, and has at all times maintained and kept the same in repair. The said paths and
47 ways are about eight miles in length and said avenues are about four miles in length.

That it has erected and put in operation at a cost of $16,000.00 a reservoir and system of water-works for said cemetery whereby and by means whereof water is supplied to the lots and plots therein, and for the sprinkling of the roads, avenues, paths, and ways, and for the culture of the grasses, flowers, trees, and shrubbery planted and growing in said cemetery.

That it has erected a lodge at the entrance of said cemetery for the occupation of its Superintendent and to facilitate the transaction of its business. That it has built and maintained walls enclosing the said cemetery on all sides thereof, and has in many other works, designed for the improvement, embellishment, and preservation of said cemetery, expended large sums of money, to-wit, more than the sum of one hundred thousand dollars.

That at the time of the purchase and acquisition by plaintiff of the cemetery aforesaid, it created a bonded indebtedness in the sum of one hundred and twenty-five thousand dollars, and for the payment thereof used and employed sixty per cent. of the proceeds of all sales of lots, plots or graves in said cemetery until the final payment of said indebtedness.

48 That heretofore and on the 13th day of December, 1890, the said bonded indebtedness was fully paid and discharged, and since that date the whole of all proceeds derived from the sale of said lots, plots, and graves has been applied by the plaintiff to the improvement, embellishment, and preservation of said cemetery, and for the incidental expenses and to no other purpose or object; and that under and by the provisions of section seven of the first mentioned Act of the Legislature of California, under and in pursuance whereof the plaintiff was incorporated, all of such proceeds received by plaintiff in the future must be applied by plaintiff to the purposes aforesaid.

And the plaintiff alleges and avers that it has yet unsold about seven acres of the area included within said cemetery, and that the same has been divided or may be divided into lots, plots, and graves sufficient for the burial of about nine thousand bodies, and that the

whole of said unsold area is now ready and has been prepared for sale to persons desiring to acquire the same for burial purposes. That the plaintiff estimates the value of said unsold ground at the sum of $75,000.00, and alleges and avers that, if allowed to continue the use of said cemetery for the purposes of its establishment, the plaintiff will be able to sell said ground, so remaining unsold, and
49 and to receive therefor and as the consideration thereof the said sum of $75,000.00, and that all of said sum, or whatever part thereof plaintiff may receive for the sale of said ground, will and must be applied by plaintiff to the improvement, embellishment and preservation of said cemetery, and for incidental expenses and to no other purpose or object.

IX.

And plaintiff further shows and avers that at the time of the establishment of the said cemetery, it was wholly outside the corporate limits of said City of San Francisco, and was distant more than two miles in a direct line from the business part thereof, and at least one mile from the residence part thereof. That no residences had been built to the west of said cemetery, and the whole country between the said cemetery and the Pacific Ocean was unoccupied except by a small number of ranch claimants.

That at said time and for a long time thereafter, no streets or public highways had been opened leading from said City of San Francisco to said cemetery, and the only way open to said cemetery for carriages or other vehicles was on and along the street or road leading to the Fort or Military Reservation of the Government
50 of the United States situate on the shores of the Bay of San Francisco at or near the entrance thereto from the Pacific Ocean, and which fort or reservation was and is known as the Presidio, and thence by a road leading from the highway aforesaid and running therefrom in a southerly direction to said cemetery, and a distance of four miles from the said city. That said last-mentioned way or branch road was constructed, maintained and kept in repair by said Gray and his associates, and for the purpose of obtaining access to and egress from the said Lone Mountain Cemetery, at which it stopped, and from or beyond it was not extended.

That for many years the said road was the only means of reaching the said cemetery by carriages, wagons or vehicles. That afterwards, and after the plaintiff had acquired the said cemetery, public streets were opened to said cemetery, but for many years no residences or dwelling places were erected in the neighborhood thereof.

That in all the official and other maps of said city and of said city and county, the tract of land aforesaid has been and is laid down, designated and described as a cemetery.

That no public streets have ever been laid down on any of said maps or opened or declared as streets into or through said
51 tract of land, but all of the streets of said city and county abutting upon said tract of land have been and are shown to end thereat.

The plaintiff has at all times since its acquisition of said lands paid all the taxes assessed thereon for State and Municipal purposes,

amounting in the aggregate to the sum of $22,731.37, and that in all the assessments and assessment rolls of said city and county wherein an assessment of said lands has been entered, the same has been designated and described as and by its name of Laurel Hill Cemetery.

That plaintiff has, at all times since its acquisition of said lands, paid all street assessments and charges for the improvement of the streets adjoining said land, and for the construction of sidewalks thereon, amounting in the aggregate to the sum of $66,403.76, and that in all assessments of said street work and sidewalks, the said land has been designated and described as and by its name of Laurel Hill Cemetery.

That at all times since the establishment of said cemetery, the plaintiff and its predecessors and the lot owners therein, have observed and performed all and every of the rules, regulations and requirements established by the said municipal corporation and
52 by the Board of Health therein concerning the interment of bodies in such cemetery, and the care of such property as and for the purposes of a cemetery; and that they, the plaintiff and its predecessors and the lot owners therein, have exercised at all times since the establishment of said cemetery, care and diligence to maintain the same and all parts thereof, so that the same could not become objectionable in any way, or be chargeable with neglect of any precautions to protect the sanitary conditions of the neighborhood in which said cemetery is situated and of said City and County of San Francisco. And plaintiff avers that at no time since the establishment of said cemetery has it, or any part thereof been, nor is it, or any part thereof, now, or will it, or any part thereof, become injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of any public park, square, street, or highway. That the soil of said cemetery is sand, and the natural condition and character thereof is such that no dangerous or disease-breeding elements can be transmitted through the same from the decaying remains of bodies buried therein.

53 That since the establishment of said cemetery, many residences have been built in its neighborhood, and the same have been and are now occupied with families, and yet it has not been proven that the district embracing said cemetery and said residences was unhealthy or subject to epidemics; but, on the contrary, the said district has always been, and is now regarded as particularly healthy and free from the diseases which prevail in other parts of said city and county.

That in the mausoleums or structures erected upon the surface of the lots in said cemetery by the owners thereof, means are provided by which the bodies interred therein are enclosed in hermetically-sealed metallic cases or coffins, and the same are placed in compartments in said structures built therein for such purpose, and sealed by the cementings of the openings.

That in nearly all the cases of burials beneath the surface, the coffins or caskets containing the bodies are enclosed in brick or ce-

ment vaults, and the same are covered of like material, so that they become, when completed, upon the making of an interment, impervious to water, if any should at any time reach them; but which, owing to the fact that the soil is of the original sand deposited
54 from the ocean, is well nigh, if not wholly impossible. And plaintiff avers that it could be reasonably provided that all interments beneath the surface should be made as above described, and thereby obviate all possible objection upon the alleged—but as plaintiff says—altogether unreasonable ground that interments without such precautions tend to the spread of disease.

And plaintiff further avers that there have never been, and are not now, any wells excavated in the neighborhood of said cemetery for the purpose of supplying water to any of the residences of families residing therein, or for consumption of human beings.

IX[1]g.

And plaintiff further shows and avers that there are within the corporate limits of the City and County of San Francisco, several large tracts of land, some of which consist of barren sand-hills, and are entirely unoccupied, and some of which are used solely for farming purposes; that some of said tracts of land contain several hundred acres of land; and interments of dead bodies could be made on several of said tracts of land, and within the corporate limits of the City and County of San Francisco, which would be more than a mile distant from any human inhabitant or public thoroughfare.

55 X.

And plaintiff further alleges that notwithstanding the premises, the Board of Supervisors of the City and County of San Francisco, defendants herein, pretending to act under and by virtue of the authority in them vested by the charter of said city and county, did, on the 26th day of March, 1900, vote, pass and adopt an order, resolution or ordinance, of which the following is a copy:—

Bill No. 54, Ordinance No. 25.

Prohibiting the burial of the dead within the City and County of San Francisco.

Whereas the burial of the dead within the City and County of San Francisco is dangerous to life and detrimental to the public health; therefore,

Be it ordained by the people of the City and County of San Francisco, as follows:—

SECTION 1. It shall be unlawful for any person, association or corporation, from and after the 1st day of August, A. D. 1901, to bury or inter, or cause to be interred or buried, the dead body of any person in any cemetery, graveyard or other place within the City and County of San Francisco, exclusive of those portions thereof which belong to the United States, or are within its exclusive jurisdiction.

SECTION 2. Any person, association or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100), nor more than
56 five hundred dollars ($500), or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment.

SECTION 3. Order No. 1961, and all orders or parts of orders in conflict with the provisions of this ordinance are hereby repealed.

In Board of Supervisors, San Francisco, March 26, 1900.

After having been published five successive days, according to law, taken up and passed by the following vote:—

Ayes.—Supervisors Booth, Boxton, Brandenstein, Comte, Connor, Curtis, D'Ancona, Dubocc, Dwyer, Helms, Hotaling, Jennings, Maguire, McCarthy, Reed, Sanderson.

Excused from voting.—Supervisor Tobin.

Absent.—Supervisor Fontana.

JNO. A. RUSSELL, *Clerk.*

Approved, San Francisco, March 30, 1900.

JAS. D. PHELAN,
Mayor and ex-Officio President of the Board of Supervisors.

That said ordinance or order was thereafter, and on the 30th day of March, 1900, approved by the Mayor of said city and county, and was thereupon printed in the official newspaper for the number of days required by said charter, and plaintiff alleges and avers that the defendants give out, threaten and intend to enforce the said ordinance and thereby obstruct and prevent the plaintiff and the lot-owners aforesaid from making any interments in said Laurel Hill Cemetery after August 1, 1900.

57 *XI.*

And plaintiff further alleges and shows that said Order or Ordinance No. 25, above set forth, is wholly void, and without force and effect, and the action of said defendants in enacting the same was and is beyond the power and jurisdiction of said Board of Supervisors, and in that behalf the plaintiff alleges:—

(1) That said Ordinance or Order No. 25 above set forth is contrary to, in violation and in derogation of the provisions of Section 8 of Article 1 of the Constitution of the United States in this:—

That it is a municipal law impairing the obligation of a contract, and in that behalf plaintiff alleges that by reason of the organization, creation and continued existence of the plaintiff, under and by virtue of the Act of the Legislature of the State of California approved April 18, 1850, entitled "An Act authorizing the incorporation of Rural Cemetery Associations," and hereinbefore mentioned, and its acceptance of the provisions thereof, and its acquisition of and holding the lands hereinbefore described and which now constitute and comprise the said Laurel Hill Cemetery, and by reason of the continued holding of said lands and their use exclusively for

a cemetery or place of burial for the dead, a contract was
58 made and established and now exists between the plaintiff and the State of California, by which and in virtue whereof, the plaintiff is entitled to continue the holding and use of said lands for the purposes aforesaid, and the lot owners therein are vested with the inalienable right to continue burials and interments in the lots acquired by them from plaintiff or its predecessors.

And further in that behalf, plaintiff alleges that the said Act of the Legislature of the State of California has never been repealed and is now in full force and effect; and, further, in that behalf plaintiff alleges that the Legislature of the State of California has never by any act, statute, or other legislative provisions authorized or empowered the said municipal corporation, the City and County of San Francisco, or its Board of Supervisors, to pass any ordinance, order, or other municipal enactment preventing, obstructing, or otherwise interfering with burials in the said Laurel Hill Cemetery of the plaintiff.

(2) That said Ordinance or Order No. 25 above set forth is contrary to, in violation and in derogation of the Fourteenth Amendment to the Constitution of the United States in this: That it de-
59 prives the plaintiff of the property without due process of law, and that it deprives the various lot owners in said cemetery of their property without due process of law, and in that behalf the plaintiff alleges and avers that if the said order or ordinance be enforced as the defendants threaten and intend to enforce the same, then the plaintiff will be prevented from making any sales of the lots now remaining unsold in said Laurel Hill Cemetery, and that all the owners of lots therein — which have been, as hereinbefore alleged and shown, improved at great expense by said lot owners — will be wholly prevented from making further or any interments in said lots, and will thereby and by reason of such prevention be deprived of their property and prevented from making lawful use thereof.

(3) That said Ordinance or Order No. 25 above set forth is contrary to, in violation and derogation of the provisions of the Act of the Legislature of the State of California approved April 18, 1859, and entitled "An Act authorizing the incorporation of Rural Cemetery Associations," and in that behalf the plaintiff alleges and shows that by the Act aforesaid and hereinbefore mentioned the plaintiff is duly formed, organized and created for the purpose of carrying on and conducting a cemetery or place for burial of the dead; and that under and by virtue of the provisions of said Act
60 the plaintiff is entitled to continue its use of the lands aforesaid for such purposes and the lot owners therein are entitled to continue the making of interments in such lots; and that the said law is still in full force and effect and has never been repealed, and that the Legislature of the State of California has not at any time by any enactment authorized or empowered the municipal corporation, the City and County of San Francisco, to violate the provisions of said Act, or to prevent the further burials in any of the cemeteries owned by corporations created, organized, and existing under and by virtue of the provisions of the Act aforesaid.

(4) That said Order or Ordinance No. 25 is unreasonable in this: That under and by virtue of its provisions burials of the dead will not be permitted—if the same shall be enforced, as said defendants give out and threaten they intend to enforce the same—at any place within the City and County of San Francisco; and in that behalf the plaintiff alleges that said order or ordinance above mentioned declares "that it shall be unlawful for any person, association or corporation, from and after the 1st day of August, 1901, to bury or inter, or cause to be interred or buried, the dead body of any person in any cemetery, graveyard or other place within the City and
61 County of San Francisco, exclusive of those portions thereof which belong to the United States, or are within its exclusive jurisdiction;" and thereby the said order has declared that it shall be unlawful to make any burial or interment within that part of the City and County of San Francisco which is under the control and jurisdiction of said municipal corporation.

And plaintiff alleges and avers that by reason of the provisions of such order, last above mentioned, the same is unreasonable, and in that behalf, plaintiff alleges that it is the duty of the said municipal corporation to provide proper places for the burial of its dead within its corporate limits, and that the said municipal corporation is without power and authority to compel other counties or municipal corporations to allow and permit the burial of the dead from said City and County of San Francisco to be had in such other counties or municipal corporations.

(5) And plaintiff further avers that said order or ordinance is unreasonable in this: That the same does not permit the prevention or abating of the injurious effects alleged to result from the continued use of such cemetery by the use and adoption of precautions, either as hereinbefore alleged, or otherwise, which would obviate all the objections in the preamble of such resolution to the burial
62 of the dead in the cemetery of the plaintiff.

That said Order or Ordinance No. 25 is unreasonable, void and of no effect, because, so far as the cemetery of the plaintiff is concerned, the facts recited in the preamble of such resolution do not exist, and the said cemetery is not now, never has been, and will not become a nuisance within the meaning of the provisions of the Civil Code of the State of California; and in that behalf, plaintiff alleges that it is not true, as stated in the preamble of the said Ordinance No. 25, that the burial of the dead within the cemetery of plaintiff is dangerous to life and detrimental to the public health, or dangerous to life or detrimental to the public health; but on the contrary, this plaintiff alleges and avers that such burial in the cemetery of plaintiff is wholly free, and will continue to be wholly and absolutely free, from any danger to life or detriment to the public health.

(6) That said Order and Ordinance No. 25 aforesaid is unreasonable, void and of no effect because the said municipal corporation, the City and County of San Francisco, has become and is estopped by its acts and conduct to claim, assert or exercise the right of making it unlawful to continue to bury and inter, or cause to
63 be interred or buried, the dead bodies of persons in the cemetery of this plaintiff, and in that behalf, this plaintiff al-

leges and avers that at all times since the establishment of said cemetery in the year 1853, the predecessor of the said municipal corporation, the City of San Francisco, and since the formation of the present municipal corporation, the City and County of San Francisco, they and each of them, have at all times known, and had full notice and knowledge of all and singular the facts above set forth, and have known that the predecessors of plaintiff had commenced and prosecuted the work of establishing a cemetery, which at the time was removed at great distance, to wit, more than two miles from the business part of said city, and had expended large sums of money in preparing said cemetery for the uses thereof; that plaintiff in the year 1868 had acquired the same from the parties by whom it had been established and theretofore maintained, and that plaintiff had sold a greater part of the lots therein and had expended large sums of money in the embellishment and preservation of said cemetery, and that a great number of persons had purchased lots in said cemetery and had improved and adorned and embellished the same at the expense of very large sums of money, in
61 full belief that they and their heirs at law would be permitted at all times thereafter to continue the interment of the dead in such lots.

That said City of San Francisco and said City and County of San Francisco have and each has, at all times until the passage of the ordinance aforesaid, encouraged the plaintiff and its predecessors in interest, and said lot owners, in the said work of maintaining, adorning and embellishing said cemetery, and of keeping and maintaining it in a beautiful and attractive condition for the uses to which it has been devoted.

That said City and County of San Francisco has received from the plaintiff a large sum of money, to wit, $24,139.79 consideration of purchase price for the lands embraced within said cemetery, and also received from plaintiff large sums of money in payment of taxes upon the same, and has further collected from plaintiff large sums of money in payment of street assessments and for the construction of sidewalks and crossings in the vicinity of the said cemetery, and that all said payments have been made to the City and County of San Francisco, and have been accepted and received by it with full knowledge, notice and information that the lands aforesaid had been devoted to the uses of a cemetery, and were being and were
65 intended to be used exclusively for such purpose, and for the continued burial of the dead therein, and yet the City and County of San Francisco retains all said sums of money and has never offered, and does not offer, to return the same to the plaintiff.

That heretofore and on March 15, 1888, the Board of Supervisors of the said City and County of San Francisco duly passed and adopted an Order No. 1961, prohibiting the burial of the dead within certain limits of the City and County of San Francisco, and therein and thereby declared that it should be unlawful for any person, association or corporation, from and after the first day of January, 1889, to bury or inter, or cause to be buried or interred, the dead body of any person in any cemetery, graveyard, or other place within

that portion of the City and County of San Francisco, bounded and described in said order; and which said portion of said city and county did not include, but on the contrary, excluded the lands and premises hereinabove described, and constituting and comprising the said Laurel Hill Cemetery.

That the said Order 1961 was passed and adopted by said Board of Supervisors of the said City and County of San Francisco with full notice and knowledge of the existence and use of the
66 said Laurel Hill Cemetery; and the portion of said city and county wherein said cemetery is situated was excluded from the effect of said Order 1961 with full knowledge, notice and information on the part of the said Board of Supervisors that the said Laurel Hill Cemetery was included therein and was being used and was intended thereafter to be used for the purposes of a cemetery and a place for the burial of the dead to which it had been devoted for many years theretofore, as hereinbefore alleged.

(7) That said Order and Ordinance No. 25 aforesaid is unreasonable, void, and of no effect, because there are within the corporate limits of the City and County of San Francisco, several large tracts of land, which are either entirely unoccupied or are used solely for farming purposes, some of which consist of several hundred acres of land, and upon which interment of dead bodies could be made, which would be more than a mile distant from any human inhabitant or public thoroughfare.

XII.

And plaintiff further alleges and avers that said city and county and the said Board of Supervisors, and the individual members thereof, and the said Mayor of said city and county, have
67 threatened, and are threatening and declaring their purpose to enforce said Ordinance or Order No. 25, and to prevent the plaintiff from interring or causing to be interred, the dead body of any person in said Laurel Hill Cemetery on and after August 1st, 1901, and to cause proceedings to be instituted against plaintiff to prevent such interments; that such threats and the declaration of such purpose tend to cloud the right and title of the plaintiff to the lawful and proper use of said property, and to prevent, impede and embarrass plaintiff in the sale and disposition of the unsold lots and plots in said cemetery, and thereby to destroy the value thereof.

That said defendants will, unless enjoined and restrained by this Court, proceed to enforce said Order or Ordinance No. 25 and will thereby involve the plaintiff in a multiplicity of suits and in expensive litigation, and will work to plaintiff a great and irreparable injury; and that although the institution of such proceedings is, by the terms of such order or ordinance postponed until the first day of August, 1901, yet the effect thereof upon the rights of plaintiff in the premises is immediate, and the same does now, and will continue to work plaintiff great and irreparable injury.

And plaintiff further alleges and avers that the said city
68 and county, and the said Board of Supervisors, and the individual members thereof, and the said Mayor of said city and

county, have threatened, and are threatening and declaring their purpose to enforce the said Order or Ordinance No. 25 and to prevent all the owners and holders of the lots and plots in the said cemetery of plaintiff from interring or causing to be interred the dead body of any person in said Laurel Hill Cemetery on and after the first day of August, 1901, and to cause proceedings to be instituted against said lot owners to prevent such interments. That such threats and the declarations of such purpose tend to, and do cause the said lot owners great anxiety, apprehension and fear that they will be disturbed, impeded, and obstructed in the proper use of said property, and will be prevented from using the same for the purposes for which it was purchased by them, and in the embellishment and improvements whereof for such purposes they have expended the sums of money hereinbefore mentioned; and thereby the whole value of said lots and of said improvements will be destroyed; and such fears and apprehensions on the part of said lot owners tend to prevent and restrain them from further adornment and embellishment of said lots and from continuing to care for and protect the same and the
69 improvements thereon; and thereby the said cemetery of the plaintiff is threatened with abandonment by the said lot owners and with the falling into decay of all of the said embellishments and adornments therein or as aforesaid erected and placed upon said lots by the said lot owners, and the same tends to the manifest wrong and damage of the plaintiff, and is now working and will continue to work to it great and irreparable injury.

And plaintiff further alleges and avers that the said city and county, and the said Board of Supervisors, and the individual members thereof, and the said Mayor of said city and county, have threatened and are threatening and declaring their purpose to enforce the said Order and Ordinance No. 25 and after the first day of August, 1901, to cause legal proceedings to be instituted and prosecuted against the said lot owners and others of them who may inter or cause to be interred the dead body of any person in any of said lots, and that the said defendants will, unless restrained by order of this Court, institute and prosecute such proceedings against said lot owners, and thereby involve them and the plaintiff in a multiplicity of suits and in an expensive litigation touching the right to make such interments; and that although the institution of such proceedings
70 is, by the terms of said order or ordinance, postponed until the first day of August, 1901, yet the effect thereof upon the rights of said lot owners and of the plaintiff in the premises is immediate; and that the same does now, and will continue to work to said lot owners and the plaintiff great and irreparable injury.

XIII.

The plaintiff alleges and avers that it has no plain, speedy or adequate remedy at law in the premises.

Wherefore plaintiff prays the judgment of this Court that the said defendants, the City and County of San Francisco, the said Board of Supervisors and the aforesaid defendants constituting the members of such board, and the said James D. Phelan, Mayor of the said city

and county, their officers, servants, agents and employees, be enjoined and restrained at any time hereafter from enforcing, or attempting to enforce, carrying into effect, or attempting to carry into effect, the provisions of said Order or Ordinance No. 25, and from in anywise interfering with the plaintiff or the said lot owners, or any of them, in the use of the premises aforesaid, or any of the lots or plots therein for the purposes to which the same have been devoted and
71 appropriated as herein alleged and described, and from preventing, or in any way attempting to prevent the plaintiff or the said lot owners, or any of them, from burying or interring, or causing to be interred or buried, the dead body of any person in the said Laurel Hill Cemetery hereinbefore described.

That the said Order or Ordinance No. 25, in so far as it tends or is intended to interfere with, obstruct, or prevent the burial or interment of the dead body of any person in the said Laurel Hill Cemetery hereinbefore described, be adjudged and decreed to be wholly void and of no effect.

That plaintiff may have such and further relief in the premises as may seem just and according to equity, and its costs of suit.

LLOYD & WOOD AND
HAVEN & HAVEN,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Giles G. Gray, being sworn, says: That he is an officer, to wit, the president of the association plaintiff, in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief; and as to
72 those matters, that he believes it to be true.

GILES H. GRAY.

Subscribed and sworn to before me this 23d day of May, A. D. 1900.

[SEAL.] W. T. HESS,
Notary Public in and for the City and County of San Francisco, State of California.

Original complaint endorsed: Filed May 24, 1900. Wm. A. Deane, Clerk, by E. M. Thompson, Deputy Clerk.

Amendments to complaint endorsed: Filed November 14, 1903. By George E. Wells, Deputy Clerk.

[Title of Court and Cause.]

Answer to Original Complaint.

Now comes the defendant above named, and for answer to the complaint of the plaintiff herein, they admit, deny, and allege as follows:—

I.

As to the allegations set forth in paragraph I of said complaint, concerning the passage of an Act of the Legislature of this State on April 18, 1859 (Stats. 1859, page 281), the terms of said Act, and whether the same has ever been repealed or are now in full or any force and effect, the defendants decline to admit or deny,
73 considering the said allegations, and all thereof, to be a pleading as to matters of law and not as to matters of fact.

As to all the other allegations contained in paragraph I of said complaint the defendants aver that they have no information or belief upon the subject sufficient to enable them to answer said allegations, or any thereof; and therefore, and placing their denial upon that ground, they deny each and every one of said allegations contained in said paragraph I of said complaint.

II.

Answering the allegations in paragraph V of said complaint contained, the defendants allege that they have no information or belief upon the subject sufficient to enable them to answer the allegations contained in paragraph V of said complaint; and therefore, and placing their denial upon that ground, the defendants deny the allegations contained in paragraph V of said complaint, and each and every one thereof.

III.

The defendants allege that they have no information or belief upon the subject sufficient to enable them to answer the allegations contained in paragraph VI of said complaint; and therefore, placing their denial upon that ground, said defendants deny said alle-
74 gations, and all thereof.

IV.

The defendants allege that they have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph VII of said complaint; and therefore, and placing their denial upon that ground, they deny said allegations, and all thereof.

V.

The defendants allege that they have no information or belief upon the subject sufficient to enable them to answer the allegations contained in paragraph VIII of said complaint; and therefore, and placing their denial upon that ground, they deny said allegations, and all thereof.

VI.

The defendants aver that the ordinance set forth in paragraph X of said complaint was regularly passed, published and approved in full conformity to law.

VII.

The defendants decline to plead to the allegations contained in paragraph XI of said complaint, to the effect that said Ordinance

No. 24 is wholly void and without force or effect upon the
75 grounds in said paragraph specified as Numbers 1, 2, 3, 4, 5, and 6 in said complaint, on the ground that the same, and all thereof, are conclusions of law, and not statement of fact; and they furthermore, for want of information or belief upon the subject sufficient to enable them to answer said allegations, deny each and every allegation contained in said paragraph XI of said complaint, except the allegation of the passage and adoption of said Order No. 1961.

Wherefore, the defendants pray to be hence dismissed, with their costs herein incurred.

GARRET W. McENERNEY AND
FRANKLIN K. LANE,
City Attorney,
Attorneys for Defendants.

Duly verified and served.

Endorsed: Filed January 26, 1901. Wm. A. Deane, Clerk, by T. C. Maher, Deputy Clerk.

[Title of Court and Cause.]

Answer to Amendments to Complaint.

Now come the defendants in the above entitled action and for answer to plaintiff's amendment to plaintiff's complaint herein, which is as follows: "And the plaintiff further shows and avers that there are within the corporate limits of the City and County of San
Francisco several large tracts of land, some of which consist
76 of barren sand-hills and are entirely unoccupied, and some of which are used solely for farming purposes; that some of said tracts of land contain several hundred acres of land; and interments of dead bodies could be made on several of said tracts of land, and within the corporate limits of said City and County of San Francisco which would be more than a mile distant from any human inhabitant or public thoroughfare."

Deny that there are within the corporate limits of the City and County of San Francisco several or any large tracts of land which consist of barren sand-hills or otherwise which are entirely unoccupied on which interments of dead bodies could be made within the corporate limits of the City and County of San Francisco, which would be more than a mile distant from any human habitation or thoroughfare; and in this behalf defendants allege that at the time of the passage of the ordinance herein and at all times since, there were and now are within the corporate limits of the City and County of San Francisco no large or any tracts of vacant land on which interment of dead bodies could be made within the corporate limits of the City and County of San Francisco which would be more than
a mile distant from any human habitation or public
77 thoroughfare, and they allege that there is no large nor any vacant tract of land, which is removed from the thickly-settled part of said city and county, or which will for any considerable

period of time henceforth remain unoccupied for dwelling purposes, or be not contiguous to dwellings or distant at all from human habitations or public thoroughfares.

Wherefore, defendants pray to be hence dismissed with their costs.

GARRET W. McENERNEY AND
FRANKLIN K. LANE,
City Attorney,
Attorneys for Defendants.

Duly verified and served.

Endorsed: Filed November 10, 1903. Albert B. Mahoney, Clerk, by J. Harris, Deputy Clerk.

[Title of Court and Cause.]

Judgment.

In Open Court, November 13, A. D. 1903.

The motion of the defendants in the above entitled action, for Judgment on the pleadings in said action, having come on regularly this day to be heard, before the Court, sitting without a jury, Messrs. Lloyd & Wood, and Messrs. Haven & Haven, appearing as
counsel for plaintiff, and Garret W. McEnerney, Esq., and
78 F. K. Lane, Esq., appearing as counsel for the defendants; and the Court having considered said motion, and the arguments of counsel for the representative parties; and motion having been submitted to the Court for consideration and decision.

It is ordered that said motion be, and the same is hereby granted.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered adjudged and decreed that the Laurel Hill Cemetery, an association, plaintiff, take nothing by its action as against the City and County of San Francisco, and the Board of Supervisors of the City and County of San Francisco, and James D. Phelan, Mayor of the City and County of San Francisco, and James P. Booth, Chas. Boxton, Henry U. Brandenstein, A. Comte, Jr., John Connor, Peter J. Curtis, A. A. D'Ancona, Victor D. Dubose, L. J. Dwyer, M. J. Montana, John E. A. Helms, Richard M. Hotaling, Thos. Jennings, A. B. Maguire, William N. McCarthy, Charles Wesley Reed, George R. Sanderson, and Joseph S. Tobin, members of and constituting the Board of Supervisors of the City and County of San Francisco; but that Judgment be, and the same is hereby
entered herein in favor of said defendants and against said
79 plaintiff, for the costs and disbursements incurred in this action, amounting to the sum of $

Judgment recorded on December 24, 1903, in Judgment Book 73, page 667.

[Title of Court and Cause.]

Certificate to Judgment Roll.

I, Albert B. Mahony, County Clerk of the City and County of San Francisco, State of California, and *ex-Officio* Clerk of the Superior Court, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled cause, and recorded in Judgment Book 73 of said Court, at page 667. And I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said cause.

Witness my hand and seal of said Superior Court, this 24th day of December, A. D. 1903.

ALBERT B. MAHONY, *Clerk.*
By DORSAN NICHOLS,
Deputy Clerk.

Endorsed: Judgment Roll filed Dec. 24, 1903. Albert B. Mahony, Clerk, by Dorsan Nichols, Deputy Clerk.

80 [Title of Court and Cause.]

Plaintiff's Bill of Exceptions to Order Granting Defendant's Motion for Judgment on the Pleadings.

Be it remembered that, on the eleventh day of November, A. D. 1903, the defendants in the above entitled action served upon the attorneys for the plaintiff in said action a notice of motion for Judgment upon the pleadings in the above entitled action, which said notice of motion, together with an order shortening the time of giving such notice, was in words and figures, as follows, to wit:

[Title of Court and Cause.]

To the Plaintiff and to its Attorneys:

Take notice that the defendants in the above entitled action will, on Friday, the thirteenth day of November, 1903, at 10 o'clock, A. M., upon said day, or as soon thereafter as counsel can be heard, at the Court Room of Department No. 1, of the above entitled Court, in the New City Hall, move the Court for Judgment upon the pleadings which are now or may be then on file herein, and for an order directing the entry of Judgment in favor of the defendants and against the plaintiff.

81 Said motion will be made upon the ground that the complaint in this action, as originally filed, did not state a cause of action, and that, when amended by the filing of the Amendment authorized to be filed by the order of this Court made November 6 1903, it will not state a cause of action.

Said motion will be made upon all of the papers on file in said action at the time of the hearing of this motion.

Dated San Francisco, November 11, 1903.

FRANKLIN K. LANE,
W. M. SIMS,
GARRET W. McENERNEY,
Attorneys for Defendants.

To the Plaintiff and Messrs. Lloyd & Wood and Haven & Haven, its Attorneys.

Good cause appearing therefor, it is hereby ordered that the time for the giving of the foregoing notice is hereby shortened to two days, so that said motion may be heard at the time specified, if notice thereof be served this day.

Dated San Francisco, November 11, 1903.

J. M. SEAWELL, *Judge*.

Endorsed: Filed Nov. 11, 1903. Albert P. Mahony, Clerk, by J. Harris, Deputy Clerk.

Thereafter, an- on the thirteenth day of November, A. D.
82 1903, the said motion for Judgment on the pleadings in said action, came on regularly to be heard before department No. Four of the above entitled Court, Messrs. Garret W. McEnerney, Franklin K. Lane, and W. M. Sims appearing on behalf of the defendants in said action, in support of said motion; and Messrs. Lloyd & Wood and Haven & Haven appearing on behalf of the defendants in said action in support of said motion; and Messrs. Lloyd & Wood and Haven & Haven appearing on behalf of the plaintiff in opposition thereto; and the Court having heard and considered the said motion, thereupon and on said thirteenth day of November, 1903, ordered that said motion be granted, and that Judgment be entered upon the pleadings in said motion, in favor of the defendants therein and against the plaintiff, which said order was in words and figures, as follows, to wit:—

(Title of Cause.)

In this action the motion for Judgment on pleadings and motion to dissolve injunction coming on regularly this day to be heard, Messrs. Haven & Haven and Messrs. Lloyd & Wood appearing as counsel for plaintiff, and F. K. Lane, Esq., and Garret W. McEnerney, Esq., appearing as counsel for defendant, and after argument of counsel for respective parties, said motions were
83 submitted to the court for consideration and decision.

Thereupon, it is ordered by the Court that said motion for Judgment on pleadings be, and the same is hereby granted, and said motion to dissolve injunction be and the same is hereby granted.

To the granting of said motion and the making of said order plaintiff duly excepted.

It is hereby stipulated that the foregoing may be settled and allowed as plaintiff's Bill of Exceptions to the order of the above entitled Court granting defendant's motion for Judgment on the pleadings in the above entitled action.

LLOYD & WOOD,
HAVEN & HAVEN,
Attorneys for Plaintiff.

GARRET W. McENERNEY,
W. M. SIMS,
PERCY C. LONG,
City Attorney,
Attorneys for Defendants.

The foregoing is hereby certified, settled and allowed as plaintiff's Bill of Exceptions to the order of the above entitled Court, granting defendant's motion for Judgment on the pleadings in the above entitled action.

J. C. B. HEBBARD, *Judge.*

Jan. 20, 1904.

Endorsed: Filed Jan. 20, 1904. John J. Grief, County Clerk, by T. C. Maher, Deputy County Clerk.

84 [Title of Court and Cause.]

Notice of Appeal.

You will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of California, from the final Judgment entered in the above entitled action in said Superior Court, on the 24th day of December, A. D. 1903, in favor of the defendants in said action, and against the plaintiff, and from the whole thereof.

Dated December 30, A. D. 1903.

LLOYD & WOODS AND
HAVEN & HAVEN,
Attorneys for Plaintiff and Appellant.

To the Clerk of the said Superior Court, and to Franklin K. Lane, Esq., City Attorney, and W. M. Sims, Esq., Deputy City Attorney, and Garret W. McEnerney, Esq., Attorneys for Defendants.

Service of the within notice, and receipt of a copy thereof is hereby acknowledged this 5th day of January, 1904.

GARRET W. McENERNEY,
FRANKLIN K. LANE,
City Att'y,
Attorneys for Defendants.

Endorsed: Filed January 5, 1904. Albert T. Mahony, Clerk, by Geo. S. Wells, Deputy.

85 *Stipulation to Transcript.*

It is hereby stipulated, agreed and certified that the foregoing is a true and correct transcript on appeal from the Judgment in the foregoing action, and that the same contains full, true and correct copies of the Judgment Roll in said action, the Bill of Exceptions upon which appellant relies, and the Notice of Appeal herein, and it is further stipulated and certified that an undertaking on appeal, in due form, has been properly filed herein on behalf of the appellant.

GARRET W. McENERNEY,
PERCY V. LONG,
City Attorney, and
WM. M. SIMS,
Attorneys for Defendants and Respondents.

LLOYD & WOOD AND
HAVEN & HAVEN,
Attorneys for Plaintiff and Appellant.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a transcript on file in my office and numbered S. F. 3855, as shown by the records of my office.

Witness my hand and the seal of the Court, this 18th day of February, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By H. G. GRANT,
Deputy Clerk.

Attest:
W. H. BEATTY,
Chief Justice of the Supreme Court.

86 S. F., No. 3855. In Bank. December 4, 1907.

LAUREL HILL CEMETERY (an Association), Plaintiff and Appellant,
v.
THE CITY AND COUNTY OF SAN FRANCISCO ET AL., Defendants and Respondents.

MUNICIPAL ORDINANCE—POLICE POWER—PRESERVATION AND PROTECTION OF THE PUBLIC HEALTH—CITY CHARTER—CONSTITUTIONAL LAW.—Under the charter of the city and county of San Francisco, read in connection with the state constitution, the supervisors have power to pass ordinances placing such restrictions upon the use of any property or the conduct of any business as may be necessary for the public health.

Id.—Id.—Extent of Police Power—Judicial Question—Discretion of Legislature.—The determination of the legislature as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts, yet the question of the expediency or necessity of a proposed restriction is primarily for the legislature, and the courts will not interfere with the exercise of such legislative discretion, unless it appears to have been arbitrarily or unreasonably exercised.

Id.—Id.—Prohibition of Burials of Dead Bodies—Power of Legislature—Line of Demarkation.—The legislature may prohibit the interment of dead bodies in the midst of thickly populated districts, but not in places where no possible danger to human life or health could result.

Id.—Id.—Id.—Id.—Rule as to Cities.—As a general rule, interments in cities may be prohibited, but circumstances might be shown, such as the inclusion therein of large uninhabited areas, as would make it unreasonable, even in a city, to absolutely prohibit burials anywhere within the limits thereof.

Id.—Id.—Prohibition of Burials Within the City and County of San Francisco—Valid Exercise of Legislative Power.—An ordinance of the city and county of San Francisco prohibiting the interment of dead bodies within the city limits, exclusive of those portions belonging to the United States, is a valid exercise of the police power of the city, vested in it by the state constitution.

Id.—Id.—Id.—Id.—Location Within Corporate Limits of Unoccupied Lands Suitable for Burials—Ordinance Unaffected by.—The fact that there are several large tracts of land within the corporate limits of the city and county of San Francisco, on which interments of dead bodies could
87 be made at points more than one mile distant from any human inhabitant, does not render such ordinance unreasonable, as the same does not prohibit interments upon such tracts, but merely prevents further interments in cemeteries already existing, it being unlawful at the time of the passage of said ordinance to bury any human remains except in a cemetery already existing.

Id.—Id.—Id.—Id.—Nuisances Limit of Police Power.—The police power granted by the constitution is not limited to the suppression of nuisances, and the ordinance in question in this case does not proceed upon the basis that further interments are to be prohibited because the cemeteries are nuisances under the general law, but that further interments therein are dangerous to the public health.

Id.—Id.—Id.—Id.—Constitutional Law—No Spoliation of Private Rights.—The ordinance in question provided a period of almost eighteen months to those affected by it to prepare for the change, and ample cause for its passage was given, which clearly distinguishes it from the sudden and

unexplained change in the ordinance before the Supreme Court of the United States in *Dobbins v. Los Angeles*, 195 U. S. 223, which was held unconstitutional.

ID.—ID.—ID.—ID.—ENFORCEMENT OF ORDINANCE—NO ESTOPPEL.—The fact that a grant of the land upon which the cemetery was located was made to the plaintiff by the city and county of San Francisco, for the purposes of a cemetery, and that the establishment and existence of the cemetery were known for many years and acquiesced in by the city and county, does not estop the city from preventing the further use of the land for the purposes of interment of the dead.

Appeal from the Superior Court of the City and County of San Francisco—J. C. B. Hebbard, Judge.

For Appellant: Lloyd & Wood, Haven & Haven.

For Respondents: William G. Burke, City Attorney; John T. Williams, Assistant City Attorney; John S. Partridge; Percy V. Long, City Attorney; William M. Sims, and Garret W. McEnerney.

This action was brought to restrain the city and county of San Francisco and its officers from enforcing an ordinance prohibiting the interment of dead bodies within said city and county, and to obtain a decree declaring the ordinance void. The defendants answered and moved for judgment on the pleadings. Their motion was granted and the plaintiff appeals from the judgment entered upon the order so made.

This court has already, in *Odd Fellows' Cemetery Association v. The City and County of San Francisco*, 140 Cal. 226, decided that the adoption of the ordinance in question was a valid exercise of the legislative power of the city and county.

It is urged, however, by the appellant that the case here presented differs in some respects from that considered by the court in its former decision. Furthermore, great reliance is placed upon two decisions—one of the Supreme Court of the United States, and the other of the United States Circuit Court for the Ninth Circuit, Northern District of California—both rendered since the filing of the opinion in the Odd Fellows' case, and both, it is claimed, inconsistent with the views there expressed by this court.

The complaint in the case at bar is very voluminous, but
88 its essential allegations do not, we think, differ materially from those set forth by the complainants in the earlier case. Briefly stated, it alleges the incorporation of plaintiff in 1867 as a cemetery association pursuant to the provisions of an act approved April 18, 1859, and entitled "An act authorizing the incorporation of rural cemetery associations." (Stats. 1859, p. 281.) It is averred that in 1853 one Nathaniel Gray, and others associated with him, were the owners of a tract of land then lying beyond the corporate limits of the city of San Francisco, containing about 160 acres, which said Gray and his associates determined to appropriate and devote to

the purposes of a rural cemetery. They prepared the land for such purposes, clearing it of brush and laying out roads and doing other work. On the 30th of May, 1854, said lands were publicly dedicated to the purposes aforesaid by the name of the Lone Mountain Cemetery, the dedication being made the occasion of a "solemn and impressive ceremony," in which the mayor of the city participated. The Lone Mountain Cemetery continued to be occupied by said association as a cemetery. In May, 1868, Gray and his associates conveyed to the plaintiff so much of the tract as had been appropriated for the purposes of a cemetery. The plaintiff entered into possession of the land and has since continuously carried on and conducted there the business of a cemetery, under the name of Laurel Hill Cemetery. On June 23, 1871, the mayor of the city and county made a grant to plaintiff of said tract of land, in consideration of the sum of $24,139.79, paid by plaintiff to the treasurer of said city and county. Since the establishment of the cemetery and its dedication in the year 1854, plaintiff and its predecessors have sold and conveyed forty thousand lots or plots, a large proportion of which have been used for the purposes of burial, but many of them are capable of receiving a number of interments in addition to those already made therein. Over two million dollars have been expended by the owners of said lots and plots, in preparing them for the burial of bodies and in the construction of monuments and tombs and the embellishment of their lots by landscape culture. The plaintiff association has also expended large sums of money in constructing roads, avenues and paths through said cemetery, in constructing a system of water works and erecting a lodge and walls. Of the area included in said cemetery the plaintiff has about seven acres unsold and ready for sale.

At the time of the establishment of the said cemetery it was wholly outside the corporate limits of the then city of San Francisco, and was distant more than two miles in a direct line from the business part thereof, and at least one mile from the residence part thereof. No residence had then been built to the west of said cemetery, and the whole country between it and the Pacific Ocean was practically unoccupied. Plaintiff avers "that at no time since the establishment of said cemetery has it or any part thereof been, nor has it or any part thereof, or will it or any part thereof, become injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of any public park, square, street, or highway; that the soil of said cemetery is sand, and the natural condition and character thereof is such that no dangerous or disease-breeding elements can be transmitted
89 through the same from the decaying remains of bodies buried therein. That since the establishment of said cemetery many residences have been built in its neighborhood, and the same have been and are now occupied with families, and yet it has not been proven that the district embracing said cemetery and said residences was unhealthy and subject to epidemics, but, on the contrary, said

district has always been, and is now regarded, as particularly healthy and free from the diseases which prevail in other parts of said city and county." There have never been any wells excavated in the neighborhood of said cemetery "for the purpose of supplying water to any residences of families residing therein, or for any consumption of human beings." It is further alleged that there are within the corporate limits of the city and county of San Francisco several large tracts of land, some of which consist of barren sand hills and are entirely unoccupied, and some of which are used solely for farming purposes; that some of said tracts of land contain several hundred acres, and interments of dead bodies could be made on several of said tracts of land, and within the corporate limits of the city and county of San Francisco, which would be more than a mile distant from any human inhabitant or public thoroughfare.

The ordinance complained of was passed on the 26th day of March, 1900, and provides that after the 1st day of August, 1901 it shall be unlawful for any person, association, or corporation to bury, or inter, or cause to be interred or buried, the dead body of any person in any cemetery, graveyard, or other place within the city and county of San Francisco, exclusive of those portions thereof which belong to the United States, or are within its exclusive jurisdiction. The violation of the ordinance is made a misdemeanor.

This ordinance is assailed by plaintiff upon the grounds that it deprives plaintiff of its property without due process of law, and impairs the obligation of a contract; and that it is unreasonable in that it prohibits acts which are in no way dangerous to life, or detrimental to the public health. It is also claimed that the city and county is estopped by its acts and conduct to assert or exercise the right of making it unlawful to continue to bury the dead bodies of persons in the cemetery of the plaintiff.

The ordinance contains a recital that "the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to public health." It purports to be passed in pursuance of what is generally known as the "police power" of the state, and of that branch of the police power which has to do with the preservation and protection of the public health. Under the charter of the city and county, read in connection with the state constitution (art. XI, sec. 11), the supervisors have power to pass ordinances placing such restrictions upon the use of any property or the conduct of any business as may be necessary for the public health. (*Odd Fellows' Cemetery Association v. The City and County, supra.*) Such ordinances must, of course, bear a rational relation to the object sought to be attained. They may not be arbitrary or unreasonable. The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or suppression of a lawful business. (*Holden v. Hardy*, 169 U. S. 366; *In re Smith*, 143 Cal. 368.) "The legislature may not, under the guise of protesting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive,
90

but is subject to the supervision of the courts. (*Lawton v. Steele*, 152 U. S. 133.)

But while the action of a legislative body in assuming to exercise the police power is always subject to review by the courts, the question of the expediency or necessity of a proposed restriction is primarily for the legislature, and the courts will not interfere with the exercise of the legislative discretion unless it clearly appears that such discretion has been arbitrarily or unreasonably exercised. (*Ex parte Whitwell*, 98 Cal. 73; *County of Plumas v. Wheeler*, 149 Cal. 778.)

There is ample authority defining the limits of the power of legislative bodies in restricting the right of interment of dead bodies. That the interment of such bodies in the midst of thickly populated districts is likely to prove a danger to the health of the surrounding population, and as such may properly be prohibited, seems to be settled by a number of well-considered cases, cited in the opinion in the Odd Fellows' Cemetery case. (*People v. Pratt*, 129 N. Y. 68; *Presbyterian Church v. Mayor*, 5 Cow. 68; *Coates v. Mayor*, 7 Cow. 585; *Kinkaid's Appeal*, 66 Pa. St. 411; *Sohier v. Trinity Church*, 109 Mass. 122; *City Council v. Westworth St. Baptist Church*, 1 Strob. 309; *Hoagland v. Front St. Methodist Church*, 109 N. Car. 132.) On the other hand, it is equally well settled that the interment of the bodies of the dead is proper, indeed necessary, and that the legislature may not prohibit such interments in places where no possible danger to human life or health could result. Thus, it has been declared by this court that an ordinance prohibiting the establishment of a cemetery within the limits of the county of Los Angeles without the permission of the board of supervisors was unreasonable and void. (*Los Angeles v. Hollywood Cemetery Assn.*, 121 Cal. 344.) This went on the ground, as was pointed out in the Odd Fellows' Cemetery case, that the county of Los Angeles "has within its limits many square miles of territory which are not only not thickly populated, but in which there are scarcely any inhabitants at all."

In the Odd Fellows' Cemetery case, some of the justices intimated that the line of demarkation is that separating cities from counties, i. e., that interments may be prohibited in cities but may not be prohibited in counties. This is perhaps too broad and general a statement of the rule. The right to prohibit interments in a given territory rests upon the conditions existing in that territory. Where a cemetery in which it is proposed to make interments is located in a thickly settled community, further interments there may be prohibited because the burial of dead bodies in close proximity to the habitations of the living has a tendency to endanger the health of large numbers of persons. Where, however, the place in which it is proposed to lay the dead is remote from human habitations or perhaps to but few dwellings, the absolute prohibition of interments is an unreasonable restriction of a lawful business, not fairly justified or required for the preservation of the public health, and will not be sustained by the courts. Ordinarily, cities are thickly populated, whereas the portions of counties lying

outside of cities are not. In view of this, it may be properly said as a general rule that interments in cities may be pro-
91 hibited. It must be borne in mind, however, that the limits of many cities include large uninhabited areas; that oftentimes cities include extensive tracts of land which are not actually occupied by dwellings, and are not likely to be for many years to come. Where a city includes considerable tracts of this character it will not be said that interments anywhere within the corporate limits may be prohibited merely because the territory involved is all included within the boundaries of a city. Thus, in *Wygant v. McLauchlan*, 30 Or. 129, 61 Pac. 867, an ordinance prohibiting burials within the city of Portland was held invalid, it appearing that there were within the city limits considerable tracts of land which were sparsely inhabited. This case is criticised to some extent by this court in *Odd Fellows' Cemetery Association v. The City and County*, but whether or not it was rightly decided on the facts appearing, we do not question the correctness of the principle that such circumstances may be shown as would make it unreasonable, even in a city, to absolutely prohibit burial anywhere within the city limits. In *Lakeview v. Rose Hill Cemetery Company*, 70 Ill. 191, an ordinance prohibiting further interments in the town of Lakeview was, by a divided court, held unreasonable and invalid. It there appeared that the town of Lakeview contained 960 acres of land and but 1500 inhabitants and that, as is stated in the opinion of the court, the lands of the company owning the cemetery "are well selected and are situated at a proper distance from the populous part of the city, in a sparsely settled community, there being but few dwellings in the immediate vicinity." This case, therefore, is no authority for the proposition that a municipality may not properly prohibit further interments in populous parts of its territory, or anywhere within the municipality, if all of it be, or may soon be, thickly settled.

In the case at bar it is true that the complaint alleges that there are within the corporate limits of the city and county several large tracts of land, some of which contain several hundred acres, and that interment of dead bodies could be made on several of said tracts of land at points which would be more than a mile distant from any human habitation or public thoroughfare. If the ordinance did in effect prohibit the interment of dead bodies upon any such tracts of land, it may be that it would be to that extent unreasonable, or at least that this allegation would tender an issue which would require the trial court to take proof to determine whether or not under all the circumstances the ordinance was unreasonable. But at the time this ordinance was adopted and for many years theretofore the Penal Code of this state contained a provision (sec. 297) making it a misdemeanor to bury or inter, or cause to be buried, any human remains in any place within the corporate limits of any city or town in this state, or within the corporate limits of the city and county of San Francisco, "except in a cemetery or place of burial now existing under the laws of this state and in which interments have been made, or that is now or may hereafter be established or organized by the board of supervisors of the county or city and county in which such

city or town or city and county situate." By reason of the existence of this statute it was already, at the time of the passage of the ordinance in question, a misdemeanor to inter any dead body in any place within the city and county of San Francisco outside of the existing cemeteries, or those to be authorized by the supervisors. There is no suggestion that the establishment of new cemeteries was contemplated. The ordinance, therefore, in effect merely prohibited the interment of bodies in existing cemeteries. It is not alleged that any such cemeteries did in fact exist upon any of the vacant tracts of land referred to in the complaint. Indeed, the only cemetery described by the plaintiff is its own and that, as is shown by the allegations of the complaint itself, is situated in the midst of a thickly settled district. As is alleged, "Many residences have been built in its neighborhood and the same have been and are now occupied with families." As no presumptions are to be indulged in support of the pleading, it may be assumed that all the cemeteries existing in San Francisco at the date of the passage of the ordinance were similarly situated. The effect of the prohibition, therefore, was merely to prevent further interments in cemeteries situated within densely populated portions of the municipality. That such prohibition is a reasonable exercise of the police power vested in the board of supervisors clearly appears from the authorities above cited.

It is, however, claimed that the ordinance is unreasonable in its operation upon plaintiff's cemetery, considered by itself, and this contention is based upon the allegations of the complaint to the effect that the soil of the cemetery is of such character that no disease-breeding elements can be transmitted through the same; that the district in which it is has not been proven to be unhealthy or subject to epidemics, and that the cemetery does not possess the characteristics necessary to constitute it a nuisance within the definition of the code. (Civ. Code, sec. 3479.) It is argued that no legislative body can by its mere assertion make that a nuisance which is not in fact a nuisance. This is undoubtedly true, but the ordinance in question does not proceed upon the basis that further interments are to be prohibited because the cemeteries in which such interments are sought to be made are in fact nuisances under the general law. The police power granted by the constitution is not restricted to the suppression of nuisances. It includes the regulation of the conduct of business, or the use of property, to the end that the public health or morals may not be impaired or endangered. As was said by this court in the Odd Fellows' Cemetery case, at page 231, "Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health if not suppressed or regulated, the legislative body may, in the exercise of its police powers make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past." "The exercise of this power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court." (*Id.*) The question is whether in the exercise of a reasonable discretion the board may conclude that the thing

prohibited is dangerous to the public health. The views already expressed make it clear that this decision may properly be reached with regard to the interment of dead bodies in thickly settled communities. Whether the danger to be apprehended from such interment is to be best averted by a prohibition of further burials, is a
93 question of policy to be decided by the legislative body. The court is not to substitute its judgment for that of the board of supervisors. Any evidence that might be introduced tending to show that, as a matter of fact, a particular cemetery had not proven or might not prove detrimental to the public health, would not alter the fact, of which courts take judicial notice, that cemeteries situated as this one is are likely to cause such injury, and are therefore, as to further use, within the control of the legislative authority.

Much stress is laid by the appellant upon the facts that a grant of this land was made to it by the city and county of San Francisco for the purposes of a cemetery; and that the establishment and existence of the cemetery were known for many years to the city and county and acquiesced in by it. From these facts it is argued that the city is estopped to now prevent the further use of the premises for the purposes of interment of the dead. There is no force in this position. Even if the city and county had made an express contract granting to the plaintiff the right to make interments in this ground in perpetuity, such contract would have no force as against a future exercise by the legislative branch of the government of its police power. (*Brick Presbyterian Church v. Mayor, supra.*) This power cannot be bargained or contracted away, and all rights and property are held subject to it. (*Boston Beer Co. v. Mass.*, 97 U. S. 25; *Butchers' Union v. Crescent City Co.*, 111 U. S. 746; *New Orleans Gas Co. v. Louisiana Light etc. Co.*, 115 U. S. 650.) The alleged estoppel relied on can have no greater force than would a contract such as the one supposed. But in fact there is nothing upon which to base the claim of estoppel. As appears from the complaint, this cemetery, at the time of its establishment, was outside the limits of the city of San Francisco, in a then unsettled district, more than a mile distant from the nearest residence section. If, as is claimed, the city acquiesced in the establishment of this cemetery and in the expenditure of large sums of money in its improvement, such acquiescence was based upon the conditions as they then existed. Since that time the city (or its successor, the city and county), has grown until it has surrounded the cemetery in question. This change of conditions altered what was before a harmless and beneficial enterprise into one fraught with danger to the community. There is no ground for the claim that because the city in 1851 considered the location in question a proper one for a cemetery, it was bound to continue to so regard it half a century later, when the situation of the cemetery with relation to the city had entirely changed.

Apart from this claim of estoppel, the case does not differ materially from that made by the plaintiffs in the Odd Fellows' Cemetery case. The decision in that case, apart, from what we have here said, sufficiently answers the contention of appellant that its incor-

poration under the act of 1859, and its purchase of the land in question, constituted a contract, which is violated by the ordinance in question. Indeed, on all the questions raised in the earlier case, we should have rested our rulings upon a mere reference to the former decision, but for the fact that the plaintiff, as has been said, relies upon two decisions of federal courts as being in conflict with our views. In *Hume v. Laurel Hill Cemetery*, 142 Fed. Rep. 91 552, the United States Circuit Court for the Northern District of California did hold upon a complaint not essentially different from that here presented, that the ordinance in question was void. While we have the highest respect for the opinion of the learned judge who rendered this decision, we cannot, for the reasons above stated, concur in it. It is claimed, further, that the decision of the Supreme Court of the United States in *Dobbins v. Los Angeles*, 195 U. S. 223, compels the conclusion that the ordinance in question is void, as depriving the plaintiff of property without due process of law. In any case, we should feel strongly inclined to follow the decision of this high tribunal, and, in a case involving a claim of right under the constitution of the United States, we should, if that decision had been rendered in a parallel case, be bound to follow it. But we think the Dobbins case is very different from the one before us. There the city council of Los Angeles had, in August, 1901, adopted an ordinance making it unlawful to erect and maintain gas works outside of a certain district. In September the plaintiff purchased lands and made a contract for the erection of gas works upon territory which was not within the prohibited zone. After the work had been commenced, the city council, on November 25, 1901, passed a second ordinance so changing the boundaries of the territory within which the erection of gas works was permitted, as to include the plaintiff's land within the prohibited territory. It was alleged that the second ordinance was adopted at the instigation of a corporation which was engaged in manufacturing gas and for the purpose of preserving a monopoly by said corporation, and that the territory which was added to the prohibited territory by the second ordinance was devoted almost exclusively to manufacturing enterprises. It was held that the ordinance was void upon the ground that the facts as to the situation and conditions were such as to establish the exercise of the police power in such manner as to comprise a discrimination against the plaintiff, the court saying: "We think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power, which amounts to the taking of property without due process of law, and an impairment of property rights protected by the 14th amendment of the federal constitution." It appeared there that within four months after the city council had fixed the limits within which the business of manufacturing gas could be conducted, and after the plaintiff had, in reliance upon this action,

purchased land within the permitted limits and gone to expense in preparing to manufacture gas, the council had, without any apparent change of conditions requiring such action, altered the limits so as to make unlawful that which but shortly before they had, in effect, declared to be lawful. This the court characterized as a "sudden and unexplained change of limits," indicating an intent to discriminate against the plaintiff, and, following its settled rule, it held that the police power could not be made a pretext for such discrimination. But these considerations do not apply to the case at bar. Here there was no change that was either sudden
95 or unexplained. By the ordinance itself a period of almost eighteen months was given to those affected by it to prepare for the change. The ordinance, passed in March, 1900, was not to be effective until August, 1901. Furthermore, ample cause for the change was shown. The land affected by it was, when originally dedicated as a cemetery, one mile from any habitation. At the time the ordinance was adopted it had become the center of a thickly populated residence district. These circumstances, which appear from the complaint itself, afford at once the justification for the exercise of the police power, and the refutation of the claim that the exercise of that power was a mere pretense for the spoliation of private rights. On the facts alleged it cannot be claimed that there was no reasonable justification for the action of the board, and there is no claim that the ordinance was passed for the purpose of discriminating against the plaintiff by imposing upon it any onerous burdens which were not imposed upon others similarly situated. We think the appellant has shown no reason why the ordinance in question was not a valid exercise of the legislative power of the city and county.

The judgment is affirmed.

SLOSS, *J.*

We concur:

ANGELLOTTI, *J.*
SHAW, *J.*
LORIGAN, *J.*
McFARLAND, *J.*
HENSHAW, *J.*

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of opinion in S. F. No. 3855 in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 20th day of February, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

96 In the Supreme Court of the State of California.

S. F., No. 3855.

Bank.

LAUREL HILL CEMETERY (an Association), Pl'tff & App.,
vs.
CITY AND COUNTY OF SAN FRANCISCO ET AL., Def'ts & Resp's.

On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Sloss J.

We concur: Angellotti J. Shaw J. Lorigan J. McFarland J. Henshaw J.

Whereupon, it is ordered, adjudged, and decreed by the Court that the Judgment of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby affirmed.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 4th day of December, 1907, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 7th day of March, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk*,
By I. ERB, *Deputy*.

97 [Endorsed:] Copy. S. F., No. 3855. In the Supreme Court, State of California. Remittitur. Laurel Hill Cemetery (an association), Pl'tff & App., *vs.* City & Co. of San Francisco, Def'ts & Resps. F. L. Caughey, Clerk, By —— ——, Deputy.

98 In the Supreme Court of the State of California.

S. F., No. 3855.

LAUREL HILL CEMETERY, an Association, Plaintiff and Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, JAMES D. PHELAN, Mayor of the City and County of San Francisco, and JAMES P. BOOTH, CHAS. BOXTON, HENRY U. BRANDENSTEIN, A. COMPTE, JR., JOHN CONNOR, PETER J. CURTIS, A. A. D'ANCONA, VICTOR D. DUBOCE, L. J. DWYER, M. J. FONTANA, JOHN E. A. HELMS, RICHARD M. HOTALING, THOS. JENNINGS, A. B. MAGUIRE, WILLIAM N. MCCARTHY, CHARLES WESLEY REED, GEORGE R. SANDERSON, and JOSEPH S. TOBIN, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, Defendants and Defendants in Error.

Certificate.

It is hereby certified that the above entitled cause was heard and determined in bank in the Supreme Court of the State of California, which Court is the highest court of said state in which a decision in said suit could be had: that the said Court in bank did on the 4th day of December, 1907, decide said case and render judgment affirming the judgment of the Superior Court of the State of California in and for the City and County of San Francisco, which was appealed from: that the said judgment of said Supreme Court has become final and Remittitur has issued thereon.

99 Wherefore this certificate is ordered to be made a part of the record and to be attested with the seal of said Court.

Dated this 8th day of February, 1908.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Attest:

F. L. CAUGHEY,
Clerk of the Supreme Court of the State of California.

By H. G. GRANT,
Chief Deputy Clerk.

[Seal Supreme Court of California.]

100 [Endorsed.] S. F. No. 3855. In the Supreme Court of the State of California. Laurel Hill Cemetery, an Association, Plaintiff and Plaintiff in Error, *vs.* City and County of San Francisco *et al.*, Defendants and Defendants in Error. Certificate. Reuben H. Lloyd, Att'y for Petitioner, Chronicle B'dg., S. F.

101 In the Supreme Court of the State of California.

S. F., No. 3855.

LAUREL HILL CEMETERY, an Association, Plaintiff and Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, JAMES D. PHELAN, Mayor of the City and County of San Francisco, and JAMES P. BOOTH, CHAS. BOXTON, HENRY U. BRANDENSTEIN, A. COMPTI, JR., JOHN CONNOR, PETER J. CURTIS, A. A. D'ANCONA, VICTOR D. DUBOCE, L. J. DWYER, M. J. FONTANA, JOHN E. A. HELMS, RICHARD M. HOTALING, THOS. JENNINGS, A. B. MAGUIRE, WILLIAM N. MCCARTHY, CHARLES WESLEY REED, GEORGE R. SANDERSON, and JOSEPH S. TOBIN, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, Defendants and Defendants in Error.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California do hereby certify that the preceding and annexed papers *papers* are true copies of the within stated papers in the case above given, which papers are on file in the office of the Clerk of the Supreme Court of the State of California: These copies with the original Citation and original Writ of Error constitute the papers on appeal to the United States Supreme Court.

The papers and copies referred to are Copy of Order allowing Writ of Error; Copy of Assignment of Errors; Copy of Petition for Writ of Error; Copy of Bond for Application for Writ of Error; Copy of Transcript; Copy of Opinion; and Copy of Certificate, together with the original Citation and original Writ of Error. Numbered from one to 92 inclusive.

Witness my hand and the seal of said Court this 21 day of February, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY,
Clerk of the Supreme Court of the State of California,
By I. ERB, *Deputy Clerk.*

Endorsed on cover: File No. 21,064. California supreme court. Term No. 314. Laurel Hill Cemetery, plaintiff in error, *vs.* City and County of San Francisco, Board of Supervisors of the City and County of San Francisco, *et al.* Filed March 12th, 1908. File No. 21,064.

(21,064)

October Term, 1909.
No. 100.

IN THE

Supreme Court of the United States

LAUREL HILL CEMETERY,
Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants in Error.

Brief on Behalf of Plaintiff in Error

THOMAS E. HAVEN,
Attorney for Plaintiff in Error.

The Recorder Print, 130 McAllister St., S. F.

TABLE OF CONTENTS.

(21,064)

Supreme Court of the United States

October Term, 1909.

No. 100.

LAUREL HILL CEMETERY,
Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

QUESTION INVOLVED:

The question raised by this writ of error is the validity of an ordinance enacted by the Board of Supervisors of the City and County of San Francisco, which prohibits the further burial of the dead throughout the entire limits of the City and County, except that part under the jurisdiction of the United States.

The ordinance involved is as follows:

"Bill No. 54, Ordinance No. 25."

Prohibiting the burial of the dead within the City and County of San Francisco.

"Whereas the burial of the dead within the City and County of San Francisco is dangerous to life and detrimental to the public health; therefore,

"Be it ordained by the people of the City and County of San Francisco, as follows:

"Section 1. It shall be unlawful for any person, association or corporation, from and after the 1st day of August, A. D. 1901, to bury or inter, or cause to be buried or interred, the dead body of any person in any cemetery, graveyard or other place within the City and County of San Francisco, exclusive of those portions thereof which belong to the United States, or are within its jurisdiction.

"Section 2. Any person, association or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less that one hundred dollars ($100), nor more than five hundred dollars ($500), or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment.

"Section 3. Order No. 1961, and all orders or parts of orders in conflict with the provisions of this ordinance, are hereby repealed."

STATEMENT OF THE CASE.

This is a writ of error directed to the Supreme Court of the State of California for the purpose of reviewing a judgment of that Court rendered in an action in equity, brought by the Laurel Hill Cemetery, an association, as complainant, against the City and County of San Francisco, and its officers, as defendants.

The action was brought in the Superior Court of the State of California, in and for the City and County of San Francisco. Its purpose is to restrain that city and county, and its officers, from enforcing an ordinance entirely prohibiting the interment of dead bodies within the limits of said city and county, and to obtain a decree declaring the said ordinance void.

The defendants filed their answers (Record, pp. 33-36) and subsequently served and filed a motion for judgment on the pleadings in favor of defendants and against the plaintiff, which motion was based upon the ground that the bill of complaint did not state a cause of action. (Record, pp. 37-38.) This motion was granted by the trial court (Record, pp. 38-39), and judgment was thereafter entered against the complainant in accordance with the order of the Court. (Record, p. 36.) Upon appeal by the complainant to the Supreme Court of the State of California, said judgment was affirmed. (Record, p. 51.)

Prior to the rendition of this last judgment a similar complaint attacking the same ordinance had been sustained in the United States Circuit Court for the

Northern District of California, in an opinion rendered by Hon. Wm. H. Hunt, which is reported under the title of *"Hume* vs. *Laurel Hill Cemetery"*, in 142 Federal Reporter, 552. This latter decision is referred to in the opinion of the Supreme Court of California, and the Justices of the latter Court state that they cannot concur therein. The question presented to both courts was whether or not the complaint states a cause of action. The Federal Court has held that it does; the State Court that it does not.

The bill of complaint sets out, at considerable length, the history of the complainant cemetery association, and the investments made by it and its members in establishing and maintaining its properties. These allegations, which are found on pages 13 to 25 of the Record, may be summarized as follows:

In 1853 one Nathaniel Gray and other persons associated with him were the owners of a tract of land which was without the then limits of the City of San Francisco, and which they decided to appropriate for the purposes of the establishment of a rural cemetery. They prepared the land for that purpose, and on May 30, 1854, said lands were publicly dedicated as a cemetery under the name of "Lone Mountain Cemetery". The dedication was participated in by the Mayor of the city and its prominent citizens. The complainant was incorporated as a cemetery association in April, 1867, under the provisions of an Act of the Legislature of the State of California, providing for the incorporation of rural cemeteries. In May, 1868, Gray and his associates conveyed the cemetery property to complainant. The complainant thereupon entered into

possession of such land and ever since has conducted thereon the business of a cemetery, under the name of Laurel Hill Cemetery.

On June 23, 1871, the Mayor of the City of San Francisco executed and delivered to complainant a deed of its cemetery property under the provisions of the Acts of Congress and the Legislature of the State of California for expediting the settlement of land titles in San Francisco. As consideration for the execution and delivery of such deed, the complainant paid the city the sum of $24,139.79. "Since the establishment of said cemetery in 1854 the complainant and its predecessors in interest have sold and conveyed 40,000 lots or plots, a large portion of which have been used for the purposes of burial, but only a small portion of which are so filled as to be incapable of receiving further interments. The law under which complainant is incorporated provides that every lot or plot in said cemetery which may be transferred to an individual holder shall be, as soon as an interment has been made therein, 'forever thereafter inalienable, and shall, upon the death of the holder or proprietor thereof, descend to the heirs-at-law of such holder or proprietor and to their heirs-at-law forever.'" The owners of the 40,000 burial lots and plots, relying upon the aforesaid provisions of law, have improved their holdings by the erection of mausoleums, tombs and other structures; and by the employment of the highest skill in landscape culture, and by architectural adornings of elaborate design and workmanship, at an aggregate expense of over two million dollars. The improvements made by such lot owners are of a permanent character, and

cannot be removed without great cost, and in many cases without the total destruction of the same. The law under which complainant is incorporated requires that the total receipts of complainant from the burial lots shall be expended by it in the improvement, embellishment and preservation of its cemetery, and for no other purpose. Since the acquisition of such cemetery, complainant has expended more than one hundred thousand dollars in its improvement, embellishment and preservation; has erected and put in operation a reservoir and system of water works at a cost of $46,000; has erected a lodge at the entrance of said cemetery; has constructed and kept in repair paths of about eight miles in length, and avenues of about four miles in length; has wholly discharged a bonded indebtedness of $125,000. Complainant now has unsold about seven acres of its cemetery grounds, which have been divided into burial lots and plots, and which are sufficient for the burial of about nine thousand bodies. The value of the unsold portion of such cemetery is about $75,000; which, if received by complainant upon the sale of such lots, must be expended by it in the further improvement and preservation of its cemetery.

The tract of land used by complainant as a cemetery has always been designated as such upon all the official maps of the city and county. No public streets have ever been laid out or opened through such cemetery. Complainant's land has always been assessed as a cemetery, and complainant has paid to the city the sum of $22,731.37 in taxes upon the same. Complainant has also paid the sum of $66,403.76 for street work and sidewalks adjoining its property.

Complainant's cemetery "has always been conducted in accordance with the rules and regulations prescribed by the Board of Health of the city; and complainant has always exercised care and diligence to so maintain its cemetery that the same could not become objectionable in any way."

The bill of complaint then contains the following allegations, none of which are denied by the answer (Record, pp. 25-26):

> "And plaintiff avers that at no time since the establishment of said cemetery has it, or any part thereof been, nor is it, or any part thereof, now, or will it, or any part thereof, become injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of any public park, square, street or highway. That the soil of said cemetery is sand, and the natural condition and character thereof is such that no dangerous or disease-breeding elements can be transmitted through the same from the decaying remains of bodies buried therein.
>
> "That since the establishment of said cemetery, many residences have been built in its neighborhood, and the same have been and are now occupied with families, and yet it has not been proven that the district embracing said cemetery and said residences was unhealthy or subject to epidemics; but, on the contrary, the said district has always been, and is now regarded as particularly healthy and free from the diseases which prevail in other parts of said city and county.
>
> "That in the mausoleums or structures erected

upon the surface of the lots in said cemetery by the owners thereof, means are provided by which the bodies interred therein are enclosed in hermetically sealed metal cases or caskets, and the same are placed in compartments in said structures built therein for such purpose, and sealed by the cementings of the openings.

"That in nearly all the cases of burial beneath the surface, the coffins or caskets containing the bodies are enclosed in brick or cement vaults, and the same are covered of like material so that they become, when completed, upon the making of an interment, impervious to water, if any should at any time reach them; but which owing to the fact that the soil is of the original sand deposited from the ocean, is well nigh, if not wholly impossible. And plaintiff avers that it could be reasonably provided that all interments beneath the surface should be made as above described, and thereby obviate the possible objection upon the alleged—but as plaintiff says—altogether unreasonable ground that interments without such precautions tend to the spread of disease.

"And plaintiff further avers that there have never been, and are not now, any wells excavated in the neighborhood of said cemetery for the purpose of supplying water to any of the residences of families residing therein, or for consumption of human beings."

The bill of complaint then contains the following allegation in paragraph IX½ (Record, p. 26):

"And plaintiff further shows and avers that there are within the corporate limits of the City and County of San Francisco, several large tracts of land, some of which consist of barren sandhills,

and are entirely unoccupied, and some of which are used solely for farming purposes; that some of said tracts of land contain several hundred acres of land; and interments of dead bodies could be made on several of said tracts of land, and within the corporate limits of the City and County of San Francisco, which would be more than a mile distant from any human inhabitant or public thoroughfare."

The allegations of the above paragraph are denied by defendants' answer.

The bill of complaint then sets out the ordinance complained of (Record, p. 26), which is as follows:

"Bill No. 54, Ordinance No. 25."

"Prohibiting the burial of the dead within the City and County of San Francisco.

"Whereas the burial of the dead within the City and County of San Francisco is dangerous to life and detrimental to the public health; therefore,

"Be it ordained by the people of the City and County of San Francisco, as follows:—

"Section 1. It shall be unlawful for any person, association or corporation, from and after the 1st day of August, A. D. 1901, to bury or inter, or cause to be buried or interred, the dead body of any person in any cemetery, graveyard or other place within the City and County of San Francisco, exclusive of those portions thereof which belong to the United States, or are within its exclusive jurisdiction.

"Section 2. Any person, association or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100),

nor more than five hundred dollars ($500), or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment.

"Section 3. Order No. 1961, and all orders or parts of orders in conflict with the provisions of this ordinance, are hereby repealed.

"In Board of Supervisors, San Francisco, March 26, 1900.

"After having been published five successive days, according to law, taken up and passed by the following vote:

"Ayes—Supervisors Booth, Boxton, Brandenstein, Comte, Connor, Curtis, D'Ancona, Duboce, Dwyer, Helms, Hotaling, Jennings, Maguire, McCarthy, Reed, Sanderson.

"Excused from voting—Supervisor Tobin.

"Absent—Supervisor Fontana.

"JNO. A. RUSSELL, Clerk.

"Approved San Francisco, March 30, 1900.

"JAS. D. PHELAN,

"Mayor and ex-officio President of the Board of Supervisors."

The bill then alleges that the aforesaid ordinance is void for sundry reasons. (Record, pp. 27 to 31.)

Those relied upon in support of this writ of error are as follows:

"(1) That said Ordinance or Order No. 25 above set forth is contrary to, in violation and derogation of the provisions of Section 8 of Article I of the Constitution of the United States in this:

"That it is a municipal law impairing the obligation of a contract, and in that behalf plaintiff alleges that by reason of the organization, creation and continued existence of the plaintiff, un-

der and by virtue of the Act of the Legislature of the State of California approved April 18, 1859, entitled 'An Act authorizing the incorporation of Rural Cemetery Associations' and hereinbefore mentioned, and its acceptance of the provisions thereof, and its acquisition of and holding the lands hereinbefore described and which now constitute and comprise the said Laurel Hill Cemetery, and by reason of the continued holding of said lands and their use exclusively for a cemetery or place of burial for the dead, a contract was made and established and now exists between the plaintiff and the State of California, by which and in virtue whereof, the plaintiff is entitled to continue the holding and use of said lands for the purposes aforesaid, and the lot owners therein are vested with the inalienable right to continue burials and interments in the lots acquired by them from plaintiff or its predecessors.

"And further in that behalf, plaintiff alleges that the said Act of the Legislature of the State of California has never been repealed and is now in full force and effect; and, further in that behalf plaintiff alleges that the Legislature of the State of California has never by any act, statute, or other legislative provisions authorized or empowered the said municipal corporation, the City and County of San Francisco, or its Board of Supervisors, to pass any ordinance, order or other municipal enactment preventing, obstructing, or otherwise interfering with burials in the said Laurel Hill Cemetery.

"(2) That said Ordinance or Order No. 25 above set forth is contrary to, in violation and in derogation of the Fourteenth Amendment to the Constitution of the United States in this: That it

deprives the plaintiff of its property without due process of law, and that it deprives the various lot owners in said cemetery of their property without due process of law, and in that behalf the plaintiff alleges and avers that if the said order or ordinance be enforced as the defendants threaten and intend to enforce the same, then the plaintiff will be prevented from making any sales of the lots now remaining unsold in said Laurel Hill Cemetery, and that all the owners of lots therein —which have been, as hereinbefore alleged and shown, improved at great expense by said lot owners—will be wholly prevented from making further or any interments in said lots, and will thereby and by reason of such prevention be deprived of their property and prevented from making lawful use thereof.

"(3) That said Ordinance or Order No. 25 above set forth is contrary to, in violation and derogation of the provisions of the Act of the Legislature of the State of California, approved April 18, 1859, and entitled 'An Act authorizing the incorporation of Rural Cemetery Associations,' and in that behalf the plaintiff alleges and shows that by the act aforesaid and hereinbefore mentioned the plaintiff is duly formed, organized and created for the purpose of carrying on and conducting a cemetery or place for burial of the dead; and that under and by virtue of the provisions of said act the plaintiff is entitled to continue its use of the lands aforesaid for such purposes and the lot owners therein are entitled to continue the making of interments in such lots; and that the said law is still in full force and effect and has never been repealed, and that the Legislature of the State of California has not at any time by any enactment authorized or empow-

ered the municipal corporation, the City and County of San Francisco, to violate the provisions of said act, or to prevent the further burials in any of the cemeteries owned by corporations created, organized and existing under and by virtue of the provisions of the act aforesaid.

"(4) That said Order or Ordinance No. 25 is unreasonable in this: That under and by virtue of its provisions burials of the dead will not be permitted—if the same shall be enforced, as said defendants give out and threaten they intend to enforce the same—at any place within the City and County of San Francisco; and in that behalf the plaintiff alleges that said order or ordinance above mentioned declares 'that it shall be unlawful for any person, association or corporation, from and after the 1st day of August, 1901, to bury or inter, or cause to be interred or buried, the dead body of any person in any cemetery, graveyard or other place within the City and County of San Francisco, exclusive of those portions thereof which belong to the United States, or are within its exclusive jurisdiction,' and thereby the said order has declared that it shall be unlawful to make any burial or interment within that part of the City and County of San Francisco which is under the control and jurisdiction of said municipal corporation.

"And plaintiff alleges and avers that by reason of the provisions of such order, last above mentioned, the same is unreasonable, and in that behalf, plaintiff alleges that it is the duty of the said municipal corporation to provide proper places for the burial of its dead within its corporate limits, and that the said municipal corporation is without power and authority to compel other counties or municipal corporations to al-

low and permit the burial of the dead from said City and County of San Francisco to be had in such other counties or municipal corporations.

"(5) And plaintiff further avers that said order or ordinance is unreasonable in this: That the same does not permit the prevention or abating of the injurious effects alleged to result from the continued use of such cemetery by the use and adoption of precautions, either as hereinbefore alleged, or otherwise, which would obviate all the objections in the preamble of such resolution to the burial of the dead in the cemetery of the plaintiff.

"That said Order or Ordinance No. 25 is unreasonable, void and of no effect, because so far as the cemetery of the plaintiff is concerned, the facts recited in the preamble of such resolution do not exist, and the said cemetery is not now, never has been, and will not become a nuisance within the meaning of the provisions of the Civil Code of the State of California; and in that behalf, plaintiff alleges that it is not true, as stated in the preamble of the said Ordinance No. 25, that the burial of the dead within the cemetery of plaintiff is dangerous to life and detrimental to the public health, or dangerous to life or detrimental to the public health; but on the contrary, this plaintiff alleges and avers that such burial in the cemetery of plaintiff is wholly free, and will continue to be wholly and absolutely free, from any danger to life or detriment to the public health.

"(7) That said Order and Ordinance No. 25 aforesaid is unreasonable, void and of no effect, because there are within the corporate limits of the City and County of San Francisco, several large tracts of land, which are either entirely unoccupied or are used solely for farming purposes, some of which consist of several hundred acres of

land, and upon which interment of dead bodies could be made, which would be more than a mile distant from any human inhabitant or public thoroughfare."

The prayer of the bill of complaint is that the defendants be enjoined from enforcing said ordinance, and that the same be declared to be void and of no effect.

SPECIFICATIONS OF ERRORS RELIED UPON.

The errors relied upon are set forth in the Record, pages 5 to 7. The eighth specification is not urged. The remaining specifications of error, all of which are relied upon, are as follows:

I.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco", was valid as to the rights of the said plaintiff in error, Laurel Hill Cemetery, an association, acquired before the passage of said ordinance.

II.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Supervisors of the City

and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was a valid police regulation lawfully adopted by the Board of Supervisors of the City and County of San Francisco, State of California, in the lawful exercise of the police power granted to the said City and County of San Francisco by the Constitution and Statutes of said State of California.

III.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was not contrary to and in violation and in derogation of the provisions of Section 8 of Article I of the Constitution of the United States in that it is a municipal law impairing the obligation of a contract.

IV.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled, "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Fran-

cisco" was not contrary to and in violation and in derogation of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of its property without due process of law and that it deprives the various lot owners in the cemetery of the plaintiff of their property without due process of law.

V.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was not an invalid ordinance as an unwarranted interference with the property rights of the said plaintiff in error acquired prior to the adoption of said ordinance, and as an impairment of the obligation of contracts made before the passage of said ordinance.

VI.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was not an invalid ordinance as abridging the privileges and immunities of the said plaintiff in error and depriving

it of its property acquired prior to the adoption of said ordinance without due process of law.

VII.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that said Court can take judicial notice that the cemetery of plaintiff in error is likely to cause injury or to prove dangerous to the health of the population surrounding the same.

IX.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was not an arbitrary and unreasonable exercise by said Board of Supervisors of the police power vested in it by the Constitution and Statutes of the State of California.

X.

By the record herein it appears that the Superior Court of the State of California in and for the City and County of San Francisco erred in granting the motion of the defendants herein for judgment upon the pleadings in said action and in entering judgment upon the pleadings without an opportunity being given the plaintiff to present evidence in support of the allegations of its complaint.

XI.

By the record herein it appears that the Supreme Court of the State of California erred in affirming the judgment of the said Superior Court rendered upon the motion of defendants for judgment upon the pleadings in said action.

XII.

By the record herein it appears that the Supreme Court of the State of California erred in not determining that the plaintiff in error was entitled to relief in a court of equity enjoining the defendants in error from enforcing the aforesaid ordinance.

XIII.

By the record herein it appears that the Supreme Court of the State of California erred in giving judgment for the defendants in this action and against the plaintiff therein.

XIV.

By the record herein it appears that the Supreme Court of the State of California erred in deciding that the ordinance adopted by the Board of Supervisors of the City and County of San Francisco, State of California, on March 26, 1900, entitled "Ordinance No. 25. Prohibiting the burial of the dead within the City and County of San Francisco" was a valid and constitutional ordinance whereas said decision ought to have been against the validity of said ordinance and that ordinance was repugnant to the Constitution of the United States and void.

BRIEF OF THE ARGUMENT.

The question presented by this writ of error is the validity or invalidity of the ordinance of the City and County of San Francisco, above set forth, prohibiting further burials within said City, as applied to the cemetery of complainant. The undenied and admitted allegations of the bill of complaint establish the following facts with regard to that cemetery, viz.:

> "That at no time since the establishment of said cemetery has it, or any part thereof been, nor is it, or any part thereof, now, or will it, or any part thereof, become injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of any public park, square, street, or highway. That the soil of said cemetery is sand, and the natural condition and character thereof is such that no dangerous or disease-breeding elements can be transmitted through the same from the decaying remains of bodies buried therein." (Record, p. 25.)

These allegations negative the existence of a nuisance, as defined in Section 3479 of the Civil Code of the State of California,* but they go further and aver

*The section above referred to is as follows:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

positively that no dangerous or disease-breeding elements can be transmitted from complainant's cemetery.

The facts disclosed by the record are, therefore, that the cemetery of complainant instead of being dangerous to health is entirely innocuous and free from danger.

Judge W. H. Hunt of the District of Montana, sitting in the United States Circuit Court for the Northern District of California, and ruling upon a demurrer to a similar complaint in which this complainant was a party defendant, has held that these facts render this ordinance unreasonable and void. He says:

> "If the cemetery in question has never been, and will not become a nuisance, and is not dangerous to life or detrimental to the public health, it is not within the constitutional powers of the municipality to suppress it. *Yates* vs. *Milwaukee*, 10 Wall. 505, 19 L. Ed. 984. For the purpose of this hearing, the Laurel Hill Cemetery has not been, and is not now, indecent to the senses, or offensive, or an obstruction to the free use of property. The offensiveness must, as a rule, consist in actual physical discomfort or a violation of the sense of decency. Mere undesirableness by reason of social or other prejudice is not sufficient, not even if it leads to a depreciation of property."
>
> *Hume* vs. *Laurel Hill Cemetery*, 142 Fed. Rep. 565.

In the case at bar, the Supreme Court of California, has held, on the other hand, that the ordinance is a

valid exercise of the police power. That Court admits "that the interment of the bodies of the dead is proper, indeed necessary, and *that the legislature may not prohibit such interments in places where no possible danger to human life or health can result*"; but nevertheless, holds that "Where a cemetery in which it is proposed to make interments is located in a thickly settled community, further interments therein may be prohibited therein, because the burial of dead bodies in close proximity to the habitations of the living *has a tendency* to endanger the health of large numbers of persons." (Record, p. 45.)

The question now presented to this Court is which of these decisions is correct.

LIMITATIONS UPON THE EXERCISE OF THE POLICE POWER.

Ordinances enacted under that power are invalid if they go beyond the necessities of the case.

The determination by legislative bodies as to the necessity of the exercise of the police power is not final nor conclusive. The duty of the courts to determine that question, for themselves, and the limitations upon the legislative branch of the government in the exercise of this broad power have been frequently announced by this Court. The latest expression on the subject is found in

Welch vs. *Swasey*, 214 U. S. 91, 53 L. Ed. 923

It is there said:

> "The statutes have been passed under the exercise of the so-called police power, and they must

have some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish, *if the statutes are arbitrary, and unreasonable and beyond the necessities of the case, the courts will declare their invalidity*. The following are a few of the many cases upon this subject: *Mulger* vs. *Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota* vs. *Barber*, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Jacobson* vs. *Massachusetts*, 197 U. S. 11, 28, 49 L. Ed. 643, 650, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Lochner* vs. *New York*, 198 U. S. 45, 57, 49 L. Ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Chicago B. & Q. R. R. Co.* vs. *Illinois*, 200 U. S. 561, 593, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175."

In *Chicago B. & Q. R. R. Co.* vs. *Illinois*, 200 U. S. 592, 50 L. Ed. 609, it is said:

"And the validity of a police regulation whether established by the state or by some public body acting under its sanction, *must depend upon the circumstances of each case, and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose*. Private property cannot be taken without compensation for public use

> under a police regulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters but only to the general welfare." * * * "If the means employed have no real, substantial relation to public objects which government may legally accomplish,—*if they are arbitrary and unreasonable, beyond the necessities of the case,*—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

In *Dobbins* vs. *Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, this Court reversed a judgment of the Supreme Court of California, which was based upon the principle that the act of the municipality in passing the ordinance there involved could not be reviewed, for the reason that to do so would be to substitute the judgment of the Court for that of the municipal council upon a matter left to the exclusive control of the legislative body. In that opinion this Court said (p. 235):

> "It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this

court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In *Lawton* vs. *Steele*, 152 U. S. 133-137, 38 L. Ed. 385-588, 14 Sup. Ct. Rep. 499-501, Mr. Justice Brown, speaking for the Court, said upon this subject:

"'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, *that the means are reasonably necessary for the accomplishment of the purpose*, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'"

The same principles have been announced in many other decisions of this Court, but further quotations would be repetition. The law is established by the cases above cited that the courts will declare municipal ordinances, which purport to have been enacted

under the police power, invalid whenever they are unreasonable or beyond the necessities of the case. It is for both of these reasons that plaintiff in error claims that the ordinance here attacked is invalid.

The point here urged is illustrated by two leading decisions of this Court, the first declaring a police regulation invalid, and the second holding another regulation to be valid. The decisions referred to are (first):

> *Hannibal & St. Joseph R. R. Co.* vs. *Husen*, 5 Otto, 465, 24 L. Ed. 527.

In that case a statute of the State of Missouri prohibiting the driving or conveying of certain cattle within the State during certain seasons of the year was held to be an invalid attempt to exercise the police power for the protection of the public health. The Court say:

> "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, *beyond what is absolutely necessary for its self-protection.*"

And again, referring to certain decisions of this Court, it is said:

> "Neither of these cases denied the right of a State to protect herself against paupers, convicted

criminals, or lewd women, by necessary and proper laws, in the absence of legislation by congress, *but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity.* These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any state legislation professing to be an exercise of the police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal Government."

And again:

"In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeazel* vs. *Alexander*, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the Legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.* And

> as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

The decision of the Supreme Court of Missouri was, therefore, reversed, and that of the Supreme Court of Illinois overruled, both of which courts had held that the laws in question were proper exercises of the police power, made necessary for protection of health. The reason of the decision in this Court was that the statutes went *beyond the necessities of the case.*

The above case, as well as the case of *Minnesota* vs. *Barber*, 136 U. S. 313, to which reference is hereinafter made, involved conflicts between the police power of the State and the power of the Federal Government to regulate commerce. The principle is the same, however, as to a conflict of the police power with any protection afforded by the Federal Constitution, whether it be the commerce powers of the general government, or the rights secured by the fourteenth amendment.

The extent to which this Court has gone in upholding laws of this character is shown in a number of cases, but in none has the subject received more comprehensive consideration than in the second case referred to, viz.:

> *Mulger* vs. *Kansas*, 123 U. S. 623, 31 L. Ed. 205.

That case upheld the constitutionality of the law of Kansas prohibiting the manufacturing within the limits of the State of intoxicating liquors. The decision

reviews the principles which justify the exercise of the police power, and refers to the rule established by the case of *R. R. Co.* vs. *Husen, supra,* and other similar cases, and then states the reason for upholding the law in question in this language:

> "Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights, *for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country, are, in some degree at least, traceable to this evil.* If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."

The difference between this last case and the case at bar is that here there are no facts within the knowledge of all, showing that the public safety may be endangered by further burials in the cemeteries of San Francisco. No one can question the harmful effects resulting from the use of intoxicating liquors; such knowledge is universal. In the case at bar, as is hereinafter shown, there is no such knowledge to justify the action of the Court. If the question of the harmfulness of the use of intoxicants were an open or debatable one, the prohibition law could not have been upheld. The difference between the two cases is vital, and furnishes the reason why this last case is not authority in the case at bar. The same comment is applicable to all cases in which police ordinances have been sustained. In each of them the necessity for the exercise of the police power in the manner prescribed was either admitted or apparent. Here it is not.

THE PROHIBITION OF BURIALS FROM WHICH NO INJURY CAN RESULT IS NEITHER REASONABLE NOR NECESSARY.

The Supreme Court of California has held that an ordinance prohibiting burials in an entire county is unreasonable and void.

Los Angeles vs. *Hollywood Cemetery Association*, 124 Cal. 344.

To the same effect are

Hume vs. *Laurel Hill Cemetery*, 142 Fed. 564-565;

Freund on Police Powers, sec. 178;

Lake View vs. *Letz*, 44 Ill. 81.

As pointed out in the opinion of the Supreme Court of California in the case at bar, the decision in the Hollywood case is based on the fact that the County of Los Angeles to which the ordinance there involved applied, "has within its limits many square miles of territory, which are not only not thickly populated, but in which there are scarcely any inhabitants at all." In the Odd Fellows Cemetery case, 140 Cal. 226, (as is also shown in the case at bar), some of the justices intimated that the line of demarkation between the reasonable and unreasonable prohibition of burials is that separating cities from counties, i. e. that interments may be prohibited in cities but may not be prohibited in counties. In the case at bar, however, the line of demarkation is held to be the proximitiy or want of proximity of habitations of the living; the Court holding that "the burial of dead bodies in close proximity to the habitations of the living has a tendency to endanger the health of a large number of persons."

With the greatest respect for the opinion of the Supreme Court of California, it is submitted that the line of demarkation between a reasonable and an unreasonable prohibition of burials is not the presence or absence of neighboring habitations, but is, rather, *the presence or absence of danger to the health of the inhabitants.* Such danger does not necessarily nor presumably follow from proximity of residences. Cemeteries might possibly be so conducted as to be a menace to the health of inhabitants at a considerable distance therefrom. On the other hand, they may be so conducted as to be of no danger whatever to persons

living under their very walls or within their borders. The record in this case establishes the latter state of facts with regard to the cemetery of complainant.

The condition of the cemeteries of London in 1843 is thus described by Sir Edwin Chadwick: "In the metropolis, on spaces of ground which do not exceed 203 acres, closely surrounded by the abodes of the living, layer upon layer, each consisting of a population numerically equivalent to a large army of 20,000 adults, and nearly 30,000 youths and children, is every year imperfectly interred. Within the period of the existence of the present generation, upwards of a million of dead must have been interred in these same spaces." (Quoted in Sixth Annual Report of the State Board of Health of Massachusetts [1875], p. 274.) In Trinity Churchyard in New York bodies were sometimes buried only eighteen inches below the surface of the ground. (*Ibid*, p. 271.) Such conditions present very different facts from those arising from single burials in each grave, under modern sanitary regulations.

The above finding of the California Court that burials in proximity to human habitations have a tendency to endanger the health of the public, is not only not supported by any statement in the record, as far as complainant's cemetery is concerned, but is contrary to the admitted allegations of the bill of complaint. Its justification, if any, must therefore be found in the judicial knowledge of the Court. To support the conclusion reached, it must be held that the Court knows judicially that further burials in San Francisco under the conditions as to complainant's

cemetery, stated in the bill of complaint, and under all other possible conditions, are dangerous to the health of the public. If this be true, the allegations of the bill of complaint as to the harmless character of complainant's cemetery cannot be true. The question is whether the Court's judicial knowledge on this subject is sufficient to warrant a finding, based thereon, which is contrary to admitted allegations of the pleadings.

COURTS CANNOT KNOW JUDICIALLY THAT THE BURIAL OF HUMAN REMAINS IN PROXIMITY TO THE HABITATIONS OF THE LIVING IS DANGEROUS TO THE HEALTH OF THE INHABITANTS.

In *Brown* vs. *Piper*, 91 U. S. 37, 23 L. Ed. 200, this Court has enumerated various matters of which courts take judicial knowledge, among which is "things which must happen according to the laws of nature." At the conclusion of the enumeration the Court say (pp. 42-43):

> "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault he may refresh it by resorting to any means for the purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. See 1 Greenl. Ev., 11. Gres. Eq. Ev., *supra;* and Taylor Ev., sec. 4 and post." * * * *"This power is to be exercised by Courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."*

When authorities differ as to scientific facts, courts cannot take judicial knowledge of them.

> "While courts may be bound to take judicial notice of scientific facts which universal experience has rendered axiomatic, it would be folly to hold that they can take judicial notice of such scientific facts concerning which men eminent in that particular branch of learning widely differ."
>
> *St. Louis Gas Light Co.* vs. *American Fire Insurance Co.*, 33 Mo. App. 367-369.

> "Courts will take notice of scientific facts of an axiomatic character, but not of those upon which there is a disagreement of opinion among men of eminence in that line of research."
>
> Underhill on Evidence, sec. 241, p. 371.

The case of

> *State of Minnesota* vs. *Barber*, 136 U. S. 313, 34 L. Ed. 455,

is particularly applicable in this connection. That case involved an act of the Legislature of the State of Minnesota which provided that no beef, veal, mutton, lamb or pork should be sold within the State unless the cattle or animals had been inspected on the hoof within twenty-four hours prior to the slaughter. The Court say (p. 319):

> "The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not re-

pugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this Court."

And again (p. 327):

"Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States.

"Underlying the entire argument in behalf of the State is the proposition that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact the court must take judicial notice. If a fact, alleged to exist, and upon which the rights of parties depend is within common experience and knowledge, it is one of which the courts will take judicial notice. *Brown* vs. *Piper*, 91 U. S. 37,

> 42; *Phillips* vs. *Detroit,* 111 U. S. 604, 606. But we cannot assent to the suggestion that the fact alleged in this case to exist, is of that class. It may be the opinion of some that the presence of disease in animals at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained."

The statute involved in the above case was entitled, "An act for the Protection of the Public Health by Providing for Inspection before slaughter of Cattle, etc." The Legislature of Minnesota had determined that the health of its inhabitants would be endangered without such inspection. It was held, however, that the Court could not know judicially that the method of inspection provided for was the only practical means of detecting disease in cattle; that the statute did not become a necessary food inspection law by calling it such in the title; and that it was invalid for the reason that it conflicted with certain provisions of the Federal Constitution.

The question in the case at bar is: What can courts know judicially as to the effects of the burial of the dead in proximity to the habitations of the living? It is conceded by everyone that certain results follow from the burial of human remains. The decay of such bodies is a fact within common knowledge; as is also the fact that decaying animal matter, when exposed to the air, is exceedingly offensive to the senses. Of these facts the courts must take judicial notice. But that is the extent of such knowledge for the reason that no further facts are universally or commonly

conceded. Some well-informed persons believe that decaying bodies even when buried beneath several feet of earth are a menace to the health of the community. Others do not. Inasmuch, therefore, as there is a conflict of scientific authority upon the subject, the matter is not one within the common knowledge and experience of everyone. More than a reasonable doubt exists upon the subject. Such doubt must be resolved by the courts in the negative. (*Brown* vs. *Piper, supra.*)

It cannot be contended that the senses of sight or smell are at all offended by modern cemeteries. The danger, if any there be, arises from the escape of deleterious products of putrefaction and decomposition. The authority of eminent scientists is to the effect that such processes, while they may be unpleasant, are not unhealthy. If there were but a substantial difference of opinion upon the subject, courts could not take judicial notice of such danger to health as an established fact. *A fortiori* such conditions cannot be said to be judicially known when such conclusions would be contrary to the beliefs of those best advised as to the matter. It may be admitted that certain persons (probably a large number) entertain a belief that cemeteries are unhealthy. It is also true that in times past certain persons have regarded cemeteries as the abode of ghosts, or disembodied spirits. Popular belief cannot be accepted as a basis of judicial knowledge, unless founded upon a scientific basis. This is true no matter how ancient the belief. A popular fancy or prejudice cannot be regarded as a "safe and proper" means for ascertaining what is generally

known. Courts will accept as a fact what is universally known, but this implies that it must be known by those best informed, as well as by the ignorant or superstitious. The prejudices or beliefs of the latter classes would form a very unstable and unsafe basis for judicial action. A belief cannot be universal when the best authorities upon the subject differ. An examination of the scientific authorities hereinafter cited will show that among scientific men it is not generally known or believed that cemeteries are unhealthy or dangerous to the communities in which they are maintained.

M. BOUCHARDAT, professor of hygiene, and one of the members of the municipal commission for the sanitation of the cemeteries of the City of Paris, gives the results of his investigations of the supposed unhealthy conditions surrounding cemeteries in that city, in an article which appeared in the "Revue Scientifique" (Paris), second series, volume 7 (August 8, 1874), pages 122-125, from which article the following illustration of the want of foundation for popular belief as to the unhealthiness of cemeteries is taken:

> "It has been repeated in certain treatises on hygiene, that certain people living next to the Church Saint-Severin (Paris) had noticed on hot and humid days that thick nauseous vapors sprang from the ground surrounding the church, which had been used for inhumation. I often visited these houses surrounding the church and failed to see any such thing.
>
> "As delegate of the committee on hygiene, I visited the Montparnasse cemetery to look into complaints that had been made by those who

lived around the cemetery. They pretended that the emanations were so strong as to render life intolerable. After a brief examination I found the complaints to be justified, but upon closer examination I noticed that the odor was stronger at one extermity of the cemetery than at the other. It was not long before I discovered the cause of the trouble. A small house nearby was converted into a factory to extract linseed oil from old hospital poultices. This strange industry was stopped and no further complaints were made.

"I made other investigations in various cemeteries of the city and always failed to discover any infectious odor."

CEMETERIES ARE NOT NUISANCES.

That cemeteries are not so dangerous to health as to constitute nuisances *per se* has been held by the Supreme Court of California and numerous other authorities.

Los Angeles vs. *Hollywood Cemetery Association*, 124 Cal. 347;
Lake View vs. *Letz*, 44 Ill. 81;
5 Am. & Eng. Ency. of Law (2d ed.), 791;
Monk vs. *Parkard*, 71 Me. 309;
Lake View vs. *Rose Hill Cemetery*, 90 Ill. 195;
Begein vs. *City of Anderson*, 28 Ind. 79;
Kingsbury vs. *Flowers*, 65 Ala. 485;
Wood on Nuisances (2d. ed.), p. 6, sec. 3.

In *Dunn* vs. *City of Austin*, 77 Tex. 139, it is said (p. 146):

"The use of grounds for a cemetery, either public or private, is not unlawful; hence when so

used no nuisance is created, unless from the manner of the use the atmosphere surrounding other property be rendered unwholesome or offensive, water in wells, springs, or reservoirs be injured by poisonous matter exhaled or otherwise thrown out, or unless the soil of other property through such use becomes impregnated with unwholesome or noxious matter from which injury results. In such cases the physical effect of nuisance passes to the property of others and thereby works injury.

"It may be that proximity to a cemetery will render property less valuable than it would otherwise be, but this furnishes no reason why the owner of ground so used should be restrained from continuing the use so long as that does not create a nuisance."

In *Musgrove* vs. *St. Louis Church*, 10 La. Ann. 431, an injunction was sought against the continuance of a cemetery in the City of New Orleans, and refused. The Court said (p. 432):

"The vicinity of a graveyard is undoubtedly unpleasant from associations with ideas the most repugnant to human nature, and frequently exaggerated by superstitious terrors. But it cannot be denied that a repository for the bodies of the dead is an indispensable part of every town or village, and under the superintendence of a good police, there is not, necessarily, anything shocking or offensive to the senses in such a repository. On the contrary, a cemetery may be rendered one of the most attractive ornaments of a city, and it is believed that such is the case with those of New Orleans in general. We would not, therefore, be prepared to say that the vicinity of a cemetery is,

per se a nuisance, without proof of special circumstances which would make it such."

A similar injunction against the same cemetery was sought by the City of New Orleans and refused in

City of New Orleans vs. *St. Louis Church*, 11 La. Ann. 244.

In *Town of Lake View* vs. *Letz*, 44 Ill. 83, the Supreme Court of Illinois say:

"A cemetery may be so placed as to be injurious to the public health, and therefore a nuisance. It may, on the other hand, be so located and arranged, so planted with trees and flowering shrubs, intersected with drives and walks and decorated with monumental marbles, as to be not less beautiful than a landscape garden, and as free from all reasonable objection."

In *Ellison* vs. *Commissioners*, 5 Jones' Equity, [illegible] 75 Dec. 433, it is said:

"Public cemeteries, for the orderly and decent sepulture of the dead, are necessary requirements for all populous towns. In fixing sites for them, private must yield to public convenience, and the courts will be particularly careful and not interfere to prevent such establishments, unless the mischief be undoubted and irreparable. Our conclusion is, that burying the dead in public cemeteries is not necessarily a nuisance, but might become so by careless and improvident modes of interment."

PROPERLY CONDUCTED CITY CEMETERIES ARE NOT UNHEALTHY.

The subject of the supposed dangers to health attributed to the presence of cemeteries in cities has re-

ceived exhaustive consideration from medical and other scientific authorities in European countries, as well as in our own. References are here given to some of the leading authorities to the effect that this danger is largely imaginary rather than real. These authorities are arranged by countries.

FRANCE.

In Paris an agitation arose after the close of the Franco-Prussian war as to the asserted menace to the inhabitants of that city from the presence therein of cemeteries in which burials had been made for many centuries, and the capacity of which had been overtaxed during the troublous years of 1870 to 1875. In 1880 a book was published in Paris by DR. GABRIEL ROBINET, entitled, *"Sur les pretendus dangers presentes par les cimetieres en general et par les cimeteries de Paris en particulier."*

After the publication of this work Dr. Robinet was elected a member of the municipal council of Paris in 1881, and was again elected in 1884 and 1887. An article by the same author containing the results of the investigations detailed in the above work, was published in the "Revue Scientifique" (Paris) in June, 1881, and a translation thereof appeared under the title "Are Cemeteries Unhealthy"? in the American "Popular Science Monthly" for September, 1881. This article is so pertinent to the contentions of plaintiff in error in the case at bar, as applying to city cemeteries, that we have annexed a copy thereof to this brief as "Appendix A". That article discusses in detail the injurious effects which might be attributable

to cemeteries in populous cities, as exhibited through the air, the soil and the waters; and proves that from a scientific standpoint no danger to health can result from any of them. Particular attention is invited to this article as printed in the appendix. We do not burden this brief with any repetition of its arguments at this point, other than to append the following synopsis of its contents.

ARE CEMETERIES UNHEALTHY?

By M. G. Robinet.

Popular Science Monthly, vol. 19, p. 657.

Possible injurious effects are exhibited through:

1. The Air.....	(a) Carbonic Acid Gas.	Results from all combustions. The amount of this gas produced in Paris daily from other sources is more than fifteen times as much as can be produced by the cemeteries in five years. Experiments prove that illuminating gas alone produces annually 3500 times more of this gas in Paris than all its cemeteries can possibly produce. No more of this gas in Paris than in the country. No danger to health from this source.
	(b) Ammonia and Sulpho-hydrate of ammonia.	Most delicate reagents disclose no trace of these in free air, not even in cemeteries.
	(c) Ptomaines.	Presence has never been detected in the open air.
	(d) Miasms or microbes.	These germs are destroyed by the combustion of corpses in the earth as soon as putrid fermentation begins. Exact micrographic researches in cemeteries of Paris show that these do not exist.

2. The Soil. . . . . { Recent experiments in the cemeteries of Paris show that the soil therein is still in a sufficiently favorable condition as to its composition to effect the absorption of gases and complete transformation of the solid and liquid matters resulting from putrefaction of bodies.

3. The Waters. { No instance of contamination of waters has been established against cemeteries. Earth purifies water. Chemical analysis shows water in cemetery of Montparnasse to be of excellent quality. Earth arrests the passage of germs through water. Wells in Paris show no increase of nitrates in twenty years.

Bad smelling effluvia are not generally injurious to health. Prejudice against cemeteries dates from last century when chemistry and hygiene were still in the rough.

Contemporary scientists are almost unanimous in regarding animal putrefaction as innocuous. No instance of noxious infection has been laid to the charge of cemeteries of Paris.

No proof exists that cemeteries are dangerous.

In 1881 another work was published in Paris by J. F. E. CHARDOILLET, under the title of "*Les Cimiteries, sont-ils des Foyes d'Infection? Resume de la question au point de vue hygienique social et moral.*"

The following translated extracts are taken from that treatise:

> "Neither the soil, the water, nor the atmosphere of Paris is contaminated by its cemeteries. These latter, when properly managed, present no danger; it is not necessary to remove them from the capital. * * *
>
> "The dangerous effects attributed to cemeteries can only affect, as we have said, the air, the soil and the waters; we shall examine these three points.
>
> "1. The alteration of the air can result from the setting free of toxic gases which come out of the earth, or else from the propagation in the at-

mosphere of miasms arising from the same source.

"Now the decomposition of corpses buried in the ground is a real organic combustion; its products are known. The chief one is carbonic acid which results from the slow combustion of the carbon contained in all organic matter, vegetable or animal, leaves, herbs, dung, corpses. It can be set free from the soil in the cemeteries and the hygienists have always considered it as one of the principal causes of their unhealthiness.

"This is an error. * * * There is then no danger to fear in this respect for the public health, arising from the cemeteries.

"The truth is that it is the confined carbonic acid alone to which should be attributed the most of the accidents which happen in burial places, which accidents moreover are much less numerous than is generally thought. * * *

"It is known, says M. Delaunay, in the most certain manner, by scientifically precise experiments, that no emanation comes in its original condition from the vaults to the surface of the soil. The researches of the skillful chemist, M. Lefort, member of the Academy of Medicine, have demonstrated that the most tenacious gases, produced in the soil at a depth of 70 centimeters (about 2.3 feet) are absorbed and recombined before they reach the surface. * * *

"This savant (M. Miquel) has proved, in opposition to the opinion of several others, that the water vapor which rises from the soil, from streams and from putrifying masses, is always micrographically pure; that is to say, it contains no microbes. The gases which rise from buried matter in the process of decomposition are always exempt from bacteria; the impure air itself, which is made to pass over putrifying meat, far from being

loaded with microbes, becomes entirely pure, under the sole condition that the infected and putrid filter should be in a state of moisture comparable to that of the earth at a depth of 3/10 of a yard from the surface of the soil. Finally, none of the numerous kinds of bacteria which M. Miquel has gathered in the atmosphere of cemeteries, when isolated and inoculated in living animals, has shown itself capable of inducing pathological trouble worthy of being mentioned. (P. Miquel, *Nouvelles recherches sur les poussières organiques*, 1879.)

"According to this we are then perfectly justified in putting absolutely to one side these pretended miasmatic emanations, these mysterious effluvia, by means of which certain hygienists have so gratuitously terrified the inexperienced public and from which certain speculators have wished to draw a profit." * * *

"2. Now, in what degree is the soil itself altered or infected as a result of the inhumation of the dead?

"* * * In this respect one can affirm, contrary to the words of the engineers of the Prefecture of the Seine, according to the experiments whose value and importance are guaranteed by the mere name of their author, Professor Schutzenberger, *that the saturation of the soil by human bodies does not exist, either from the point of view of gas nor from the point of view of solids.* The results of the experiments of this scientist show that the chemical composition of all the ground in the cemeteries [in Paris] offers conditions quite suitable for the absorption of the gases and for the complete transformation of the solid and liquid materials furnished by the putrefaction of the bodies buried in it. The examination, in as

far as it concerns the gases, has given results identical with those furnished by the analysis of good arable lands. * * *

"However, if it is desired, nothing would prevent the modification of the composition of the earth of the cemeteries by proper improvements or by special drainage which would augment in intensity and rapidity their power of decomposition. A modification of this kind is certainly not beyond the actual power of modern chemistry and technology.

"3. Relative to the possible alteration of the waters, nothing serious has yet been proved.

"There have been shown by one cause or another, exceptionally unfavorable cases, but none has been proved in the domain of Paris. * * * On the contrary what most recurs from the study of the facts is the marvelous purifying power of the earth, which one may consider as a perfect filter.

"It would take too long to report here all the proofs for the non-infection of water by cemeteries. We will remark only that the chemical analysis of the water of a well situated in the middle of the cemetery of Montparnasse has indicated a liquid of very good quality, and in regard to the inferior organisms, those much feared saprophytes, which could be carried by the waters passing through the cemeteries, M. Pasteur has shown that the spring water which comes out of the earth, even at a slight depth, is freed from all germs to such a degree that they can not fecundate liquids most susceptible to alteration. * * *

"In conclusion, it can be affirmed that to this day not a single positive fact has been proved against the cemeteries of Paris."

In the reports of the work of the COMMITTEE ON PUBLIC HYGIENE, published in Paris in 1896 (vol. 26, pp. 26-77), are found accounts of experiments as to effect of cemeteries on the soil, the air and the water. The results of the experiments conducted by M. SCHUTZENBERGER, a member of the municipal commission for the sanitation of cemeteries of the City of Paris (1884) are given in the form of question and answer as follows:

First Question—"Is the soil of cemeteries, at the end of a certain period of use, saturated with organic matter capable of making it unsuitable for the final consumption of new cadavers?"

Answer—"The small quantity of organic matter contained in the earth of the graves, shows clearly that combustion is complete after five years, in earth moderately permeable to air, and that, as a result, there is no reason for believing in the idea of a saturation of the earth by organic matter."

Second Question—"Is the slow destruction of cadavers in normal conditions of burial of a nature to develop and send out in the atmosphere harmful gases?"

Answer—"In no case has the most attentive and the most minute examination been able to reveal the least trace of the gases mentioned above (hydrogen sulphide, ammonia, and carbonic oxyde, the only gases scientifically admitted to be poisonous)."

The same reports contain an account of the experiments made by M. O. DU MENSIL and reported by him to the same commission as to the effect of the air of cemeteries on different animals. In these experi-

ments chickens and rabbits were exposed to the air in ditches and trenches dug at varying depths in cemeteries. In every case the animals gained in weight and were taken out of their confinement, after stated lengths of time, in healthy condition, and without having suffered the least inconvenience on account of the air.

Further experiments are reported by M. MIQUEL, meteorological assistant at the Montsouris Observatory, giving microscopical analyses of the air at the observatory park and in the cemeteries of Paris. These experiments show conclusively that the air of the cemeteries contained no more bacteria than are contained in the air of the park.

Volume 19 of the "REVUE DES SCIENCES MEDICALES," published at Paris in 1882, contains a resume from a work on "Cemeteries and Cremation" by F. MARTIN, from which the following translated extracts are taken:

> "There are scarcely twenty cases of accidents that are charged to cemeteries. The majority of these date from the last (eighteenth) century, which is to say that the accounts of them are not given in detail and can not be thoroughly controlled. Moreover a full half of these accounts have to do with burials in churches. Indeed nothing has proved that a well kept cemetery has a harmful influence on the health of the neighboring residents. It is true that certain excavations or exhumations have caused some isolated accidents, but it is only fair to state in this connection the following facts. From 1785 to 1787 there were exhumed, under the direction of Thouret and without any accident, 15 to 20,000 corpses from

the cemetery and church of Saints-Innocents. At the end of the war of 1870 numerous exhumations were made in the neighborhood of Paris, all equally without danger for the laborers concerned. Every year indeed, in the large cemeteries of Paris a large number of recently interred bodies are exhumed from the provisional graves, but never has this resulted in any inconvenience for the diggers.

"Bouchardt has already said: 'There is in the public mind and in writings devoted to the hygiene of cemeteries a great deal of exaggeration in regard to the poisonous effect of the emanations rising from the graves to the open air. People have confused the confined air of vaults with the gaseous emanations which can be produced in the free air in the cemeteries. One should study separately everything connected with exhumations and with the working and moving of the earth in abandoned cemeteries.'

"It is to the confined carbonic acid that we owe nearly all of the accidents that have been described, but that is not a danger peculiar to cemeteries,—the same accidents can happen in pits, caves, cellars, wine vats, lime kilns, etc.

"Robinet has tried to estimate the maximum quantity of carbonic acid set free from bodies buried in the cemeteries of Paris. He has arrived at the curious result that the gas lighting of the Opera alone produces a quantity of carbonic acid thirteen times greater than the said maximum quantity in the course of one year.

"On the other side, Miquel has shown that microscopic germs gathered simultaneously at the observatory of Montsouris and at the cemetery of Montparnasse were identical. The average num-

ber of these to a litre of the analysed air was 20.3 at the cemetery and 19.6 at the meteorological observatory. Cemeteries then do not change the *air* to an appreciable degree. Do they then pollute the soil or water?

"In regard to the first point the experiments of Schutzenberger, made at the cemetery of Montparnasse, bring a negative conclusion.

"In regard to water, Fonssagrives and J. Lefort have cited several definite facts against which it would not be difficult to range a larger number of contrary facts. We will content ourselves in reproducing the results to which Fleck has come after having analysed 21 samples of water taken in the different cemeteries of Dresden. All these samples of water contained nitrates, sulphates chlorides and other salts, final products of the oxydation of animal matter, but a cesspool or a badly constructed drain gives out more organic matter to the water of the sub-soil than the most saturated cemetery.

"The author has repeated, in collaboration with M. Machin, the analyses performed by Boussingault thirty years ago on the same Parisian pits and wells. The quality of their water has not degenerated since that time although burials have been continually made."

An essay on the "HYGIENE OF CEMETERIES" by CHARLES A. LE MAOUT was published at Bordeaux in 1899, which contains a thorough study of the hygienic value of cemeteries and the hygiene of inhumations. The conclusions of this writer as to the effect of burials upon the air, the soil and the water are as follows (translations). As to the atmosphere (p. 65):

"All the preceding shows us in a sufficiently clear manner that the atmosphere of the cemeteries 'without being more vital than any other', as the clinicien Demoulin pretended, more than a century ago, is in no way dangerous for the people of the neighborhood who breathe it nor even for the workmen who live there continually. In the first place it contains as abnormal chemical substances only the gas which is formed daily in all places where human beings are gathered closely together and which is found in such a state of diffusion that it can not be toxic. In the second place, it is proved that the layer of air just above our great cemeteries holds in suspension no more animal or vegetable organisms than those observed daily in parks which are reputed to be very healthy, and no more virulent pathogenic bacteria than those which exist in other parts of the atmospheric envelope of cities."

As to the soil (pp. 38, 39):

"To the support of the thesis of the innocuity of the cemeteries in respect to microbes, we can study the documents furnished by epidemicology.

"In the history of the medical sciences, there does not exist, to our knowledge, a scientifically proved fact, based on exact observation, to show that an epidemic has ever had its origin in a cemetery. Indeed one of the most interesting proofs which we could possibly invoke on this subject, is the great inquest made on the 559 cemeteries in the Department of the North in 1869, the report of which was made by Dr. Pilat. Without stopping to discuss here the personal opinion of this physician, who believed in the harmfulness of the cemeteries, and paying attention only to the clo-

quence of figures, we perceive that at that time the average annual mortality rose to 2.64 per cent in the communities where the cemeteries were situated outside, while it fell to 2.43 per cent for the communities in which they were placed at the center.

"Moreover, during the war of 1870-71, many French and German soldiers died in our country as a result of an epidemic of variole and of typhoid fever, but the statistics show us that it was during the years 1872-73-74 that these two contagious diseases caused the least mortality in France. That is to say, at a time when their germs after having multiplied in the soil of the cemeteries, should have filled the atmosphere and the surrounding waters and thus propagated the infection, there was less mortality than usual. * * *

"Therefore the soil of cemeteries, both from the point of view of its possible saturation and from that of the prolonged presence of infectious germs, can not be incriminated of any well determined case of unhealthfulness."

As to the water:

"In these conditions the waters which issue from a soil used for inhumation and which have benefited by a natural purification, equal in value to that obtained artificially in the irrigated fields in the suburbs of Paris, can not be accused of polluting the rivers or the neighboring streams, nor can they be accused by the people as a possible cause of epidemics."

In the article by PROF. BOUCHARDAT, member of the municipal commission for the sanitation of the cemeteries of the City of Paris in volume 7, second series,

of the "Revue Scientifique" (pp. 122-125), heretofore referred to, the author, after giving the illustrations copied in a preceding paragraph of this brief, proceeds as follows:

> "After the siege and the fatal events of the 'Commune', I was sent with my colleagues to investigate the condition of all the cemeteries of the City, but none of us could discover the slightest odor, still the decomposition must have been going on very actively due to the great numbers which were buried.
>
> "During the fatal years of 1870-1871, the mortality was enormous and the cemeteries were filled with dead. The members of the committee feared that a typhoid epidemic would ensue. But not a single case was reported in Paris. But a great many died from typhoid fever during the siege; the cemeteries were filled with their bodies. From that time on, however, the cases of typhus were continually decreasing and the minimum number of cases were reported during 1872-1873.
>
> "It has been proved in a few rare instances, that small-pox was capable of being transmitted from a decomposed body to a living person. Still the cases of small-pox have been continually decreasing since the siege of Paris, even though the mortality from that disease was considerable at the time.
>
> "A close observation of facts proves the exaggeration of public opinion which attributes 'a positively noxious character to cemetery emanations.'"

IN GERMANY.

DR. RUDOLPH MÜLLER published an essay in Dresden in 1885 entitled, "Schädigen die Kirchhöfe die

Gesundheit der Lebenden?" The conclusions of Dr. Müller as to the inocuousness of cemeteries is based upon a review of many authorities, as is shown by the following translated extracts:

"The declaration, so often made and so often read, that graveyards poison springs, shows itself, when looked at more closely, to be wrong. I have examined a great number of analyses of water rising from cemetery springs, analyses which would be tedious to read here; and I have come to the firm conviction which Reinhard, the President of the Royal Saxon Medical College, expresses in the following words: 'Pollution of water rising in cemeteries does not occur except in the rarest cases. As a rule water from springs in cemeteries is purer than that of springs in inhabited places.'

"And this opinion that cemeteries in general poison neither water nor air may be shown to be held by a great number of hygienists of all countries. The following is a series of examples:

"M. v. Petterkofer (Was man gegen die Cholera thun kann, p. 20. Münich, 1873. R. Oldenbourg) says: 'Piles of manure, cesspools, etc., near dwellings pollute the ground near by and underneath much more than do the corpses of a burying ground, which in their graves have had six years and more in time and a relatively greater space for the decomposition, than the organic waste of human life in thickly populated towns. * * * The water from springs in graveyards has often been subjected to chemical examination for impurities coming from the contents of the graves, but to my certain knowledge this has almost always been with negative results.'

"Lion (A. Lion. Das Beerdigungswesen. Handbuch der Med.- und Sanitätspolizei, III, pp. 132-36. Iserlohn, 1875. J. Bädeker) writes: 'It has been used as a reason for cremation that the pollution of the ground of the air and of drinking water by poison from corpses would be avoided thereby. With properly chosen soil however, and with good arrangements for interment this can not happen; this fear has its origin in the time of common graves and the time when graves were used again to receive new bodies before the process of decomposition was finished. Since the first (common graves or trenches) are forbidden and a period of thirty years is prescribed by law for the latter, and since a grave must be six feet deep, these dangers are not real.'

"'According to the present state of science,' says C. v. Nägeli (Bestättung der Leichen. München, 1877), 'it is not to be doubted that in describing the dangers of cemeteries there has been a gross exaggeration. The harmful results which cemeteries are said to have are not proved by experience and are theoretically unfounded. Indeed should any sort of danger really arise, it may be easily and completely avoided.'

"District surgeon (Kreis-Medicinalrath) Kerschensteiner (Gutachten über die Einführung der fakultativen Leichenverbrennung. Münchener Gemeinde-Zeitung, Nr. 102. Bilage, 22. December, 1878), who for a long time has shared in the opinion of the danger of cemeteries, later experienced a change in his convictions, chiefly through the analyses of cemetery springs by v. Pettenkofer and by Fleck. He gave it out as his official opinion 'that for the city of Munich there is no need, from the standpoint of the public health, to introduce cremation.'

"Wernher in his extensive work combats the hygienic necessity of cremation with especial force. (A. Wernher. Die Bestattung der Todten in Bezug auf Hygeine, geschichtliche Entwickelung und gesetzliche Bestimmungen betrachtet. Giessen, 1880.) 'The chief question, the alleged common danger of the present method of interment and the alleged extent of the danger, are entirely unproved; with them however stands or falls the decision as to the necessity, not only of improving our present methods of disposal of the dead but of completely and fundamentally changing them.'

"The society of physicians in Zürich declared in the year 1875 by a great majority 'that the method of disposal of corpses used hitherto has no results that are harmful to health, taking it for granted that cemeteries are properly constructed and the society does not therefore consider itself justified in promoting the introduction of cremation.'

"In France Bouchardat, the well known professor of Hygiene in the faculty of medicine of Paris, is prominent in combatting the alleged evil effects of cemeteries on air and water. 'I know of no fact which demonstrates the danger of separate graves,' he says in his 'Traité d'Hygiène publique et privée, p. 830, Paris, 1881.'

"Ladreit de Lacharrière (De la crémation des morts. Rapport, lu dans la Soc. de méd. lég. de France. Ann. d' Hyg. 3. Sér. t.6. p. 556, 1879) states that in those epidemics during which he assisted as a physician, he observed no trace of the influence of cemeteries and although since 1864 he has had charge of the supervision of burials in Paris, he has never been able to prove that in

cholera and typhus epidemics the people living next to or near cemeteries were attacked more frequently or severely by these diseases than the rest of the population. He considers the present administration of the laws sufficient to do away with any evil conditions that might arise.

"Lacassagne and Dubuisson (La Crémation; in Dictionn. encyclop. des Sciences médicales, pub. par Dechambre, vol. XXIII, p. 5. Paris, 1879) say: 'There is no doubt that cremation would become general if the present condition of things were as a whole as dangerous and threatening as the friends of cremation declare. But the dangers of the cemeteries are absolutely unproved and indeed so far from being proved that people are not prepared to avoid the possible dangers beforehand. In all cases (which were used as proofs for the dangers of cemeteries) man must ascribe the danger to himself and not to the cemeteries which are not to blame. What people must prove and what they do not prove is, that those who are by their condition and business most exposed to the attacks of the fearful miasms, such as the people living close to cemeteries or those whose work calls them there, from the grave-digger to the city official, are attacked more by illness than people who live at a distance from cemeteries or seldom go to them.'

"In Holland it is Admiraal (D. J. Admiraal. De kerkhofkwestie. Isis IV. 8, p. 225; 1875) who denies that well-kept churchyards have a destructive effect on air and water; in England it is Holland [a prominent physician] whose voice has especial importance, since he stands at the head of cemetery matters in England. It would be worth while to enter more thoroughly in the controversy which has taken place in the latter country over the cemetery question.

"The well-known English surgeon Henry Thompson made the following declaration: 'It is unnecessary to show proofs for the facts that our present way and method of disposing of the dead, namely burial, is full of danger for the living, for the fact is too generally known.' Unexpectedly there arose to combat this statement the one man in the Kingdom most competent in respect to this question, the above-mentioned burial-inspector for England and Wales, to whose knowledge all complaints in regard to cemeteries must come. 'I am,' said Holland, 'convinced, that the practice of burial can be carried on without danger for the present or for any coming generation (Holland, Philip H. Medical inspector of burials). Burial or Cremation? Contemporary Review XXIII, p. 477-484. Jan. 1874). * * * That such places of burial, well situated as they generally are, may be mismanaged so as to become unsafe, is quite true, for so long as men are men, mistakes, and worse than mistakes, will occasionally occur; but in order that faults of management may not be seriously dangerous, as well as for other evident reasons, it is right and prudent that cemeteries should not be too near dwellings. However small a danger may be, it is foolish to incur it, and wrong to expose others to it needlessly. But the real danger from a well-situated and well-managed cemetery, large in proportion to the number of its burials, is not greater than from a well-managed railway; and it would be hard to find in either any but the very rarest instances of injury sustained, except from palpable mismanagement. To give up burial, therefore, because of the very slight amount of its *inevitable* danger would be as wise, or rather as foolish, as to give up the safest known mode of travelling, because one railway

passenger in some eight or ten millions gets killed. The simple fact is, that it is not so much the burial, as the unburial of the dead that is dangerous, including of course in that term the disturbance of soil impregnated with putrefying, but not yet putrefied, animal matter. In cemeteries of ample size, there is, however, little temptation and no excuse for incurring this risk, or that of placing in the soil a larger quantity of putrescible matter than it, and the plants on it, will completely absorb, or than the air carried down by rain and dew will thoroughly decompose. * * *"

IN ENGLAND

A series of articles appeared in the London Times written by F. Seymour Haden. The following extracts are taken from that paper of May 20, 1875, at page 10:

"Nor, contrary to popular belief, does the decaying body itself, when buried in a sufficient quantity of earth to resolve it, impart any impurity whatever to the adjacent soil or to the other elements around it, a fact which any one may ascertain for himself by digging down upon the body of an animal which has been buried, it matters not how long or how short a time, and finding (as he will do if he proceed cautiously) that the soil in contact with it has only been affected by it to about the eighth of an inch, and that, until this very last film of enveloping earth has been reached and removed, no smell whatever has been emitted from the excavation he is making." * * *

"Nor, again, is the effect of the earth upon fluids in a state of putrescence at all less remarkable than upon solids—filtration through a few

feet of common earth being sufficient to deprive the foulest water of any amount of animal or other putrid matter contained in it. We need go no further for a proof of this than to a certain pump in Bishop-gate Street which stands opposite the rails of the old churchyard there, and of which Mr. Simon, the distinguished Medical Officer of the Privy Council, gives us an interesting account." (Quoted in note from International Cong. of Hygiene. Transactions of the seventh Congress, London, 1891. Discussion following report of MM. Brouardell and du Mesnil.)

Extensive investigations of this subject were also made in England by P. H. Holland, the official medical inspector of burials in England and Wales, which are referred to by the German author above quoted and in the American authorities hereinafter referred to.

IN AMERICA

The most thorough report upon the subject under discussion is found in

THE SIXTH ANNUAL REPORT OF THE STATE BOARD OF HEALTH OF MASSACHUSETTS, published in January, 1875, which contains an elaborate report upon the relative advantages and disadvantages of cremation and burial, by J. F. A. Adams, M. D., of Pittsfield. (Pp. 243 to 325.) Many authorities upon the question of danger, or lack of danger from proximity of residents to cemeteries are cited in this report. A series of questions as to whether or not any instances of sickness appeared to be induced or aggravated by proximity of cemeteries to dwellings, and the causes therefor, was submitted by the writer of this report to some

three hundred medical correspondents. As might be expected, a considerable difference of opinion was evidenced by the replies. The result of the investigation is summarized, however, by the writer of the article as follows:

> "We must confess to being greatly surprised at the small amount of evidence we have been able to gather of any positive injury known to result from burial-grounds. Of the five cases in this State, the first occurred 'some years ago', and the fourth 'years ago', and no particulars are given of either case. In the second case (Groveland), there is scarcely enough to hang a suspicion upon, especially as further investigation has shown the well to be 300 feet from the nearest grave, while the privy and barnyard are but 30 and 80 feet away, respectively. In the fifth case (North Prescott), the water has been found to be bad; but, since the nearest grave is 500 feet away, while there is a drain within less than 50 feet, and a privy and barnyard but little further removed, the contamination cannot fairly be attributed to the cemetery. Thus the third case (Lenox) is left as the only one in which there is a reasonable presumption that the cemetery may have caused injury to health. As the physician reporting the case has removed from the State, we have been unable to more thoroughly investigate it."
>
> "Of the cases not in this State, in Dr. Baker's, the influence of the graves was merely possible. Dr. Kennet, of London, refers to a crowded churchyard in that city, closed twenty-four years ago, at the time of the English burial reform; Dr. Cameron, of Dublin, reports one or two cases in Ireland, where the deleterious influence of graveyards was well established, and Mr. Holland, of

London, than whom no person living can speak more authoritatively, says that he has never known any injury to result from any modern, well-managed cemetery, although he has from the old over-crowded burial-grounds, now nearly superseded. The two last-named authorities, although furnishing this evidence, are firm believers in the absolute harmlessness of burial, if properly performed."

The Mr. Holland referred to above was the medical inspector of burials in England and Wales. His full reply is set forth on page 287 of the Report, in which he states:

"If by the term cemeteries is meant what are popularly so called in England, namely, large urban or suburban burial-grounds, which may be fairly described as small parks or large gardens, —used also as places of sepulture,—in which regulations, such as those enclosed, or others practically equivalent to them, are observed, I reply that I have never known of any instance of sickness which appeared to be induced or aggravated by any such cemetery, of ample size for its burials, well situated and well managed. If by cemeteries it is intended to include those burial-grounds, the use of which, in England, is now nearly superseded,—small, overcrowded, in close situations, and in which soil was disturbed before the putrid matter in it was decayed,—I reply that I have no doubt that much mischief was done by them; but that such mischief was more frequently in depressing health than in causing actual disease, and that other causes of ill-health so frequently, so almost constantly co-existed, that it is difficult to decide how much of it was due to one particular cause."

Mr. Holland again states on page 305:

> "I am quite convinced, as the result of my nearly twenty-one years' extensive observation, that interment in cemeteries of proper size, properly situated and properly managed, is perfectly safe; nay, *if proper management could be always secured, would be safe, even in the close neighborhood of houses.* But it is prudent and wise to leave them in open situations, both because land wanted for building on is very expensive, and therefore cemeteries close to houses would probably be too small to be safe; and, secondly, because as everything human is liable to mismanagement, therefore graves should be where, if accidental mismanagement should occur, serious mischief need not be feared. Another reason is, that bodies are sometimes brought for burial in an offensive or dangerous condition, from which injury might be caused if dwellings were very close; but, when there is nothing to obstruct the free passage of air, there is little practical risk to any one, and none at all to those at some moderate distance."

The reply of many physicians are given on pages 289 to 291 of the Report, from which the following are taken as illustrative of the opinion of many of the medical gentlemen appealed to.

A physician in Cambridge, Massachusetts, states:

> "I do not remember an instance in which I have had reason to believe that sickness was caused or aggravated by the proximity of dwellings to cemeteries. On the other hand, it may not perhaps be amiss to state, that I have known dwellings near to large cemeteries, in which persons have lived, children been born and reared, with-

out evidence of injurious influences. Mt. Auburn cemetery, the Catholic cemetery, and the Cambridge city cemetery are quite near each other; the first two adjoining, and the other separated from these by a public road only. In Mt. Auburn alone, more than 19,000 interments have been made; in the other cemeteries, also, the numbers are large; but it is not known that new diseases have appeared in their vicinity, or that known diseases have been modified, or that they have injured the health of the neighborhood, or of the laborers constantly employed in them during the summer. Dwellings are within one hundred feet of the Catholic cemetery. The other Catholic cemetery at North Cambridge is crowded; in some instances several bodies in one grave. The cemetery is closely surrounded by houses fully inhabited, one house is in the cemetery, but no injurious effects are known to me."

Dr. Robert Reyburn, of Washington, D. C., states:

"I lived for a number of years in Philadelphia within a block of a cemetery which was in constant use as a place of interment, and never remember to have seen a case of disease that could be fairly traced to that cause, though I practised extensively in the immediate vicinity. I can readily understand, however, that a cemetery densely filled in a crowded city may become a dangerous neighbor; *but if it is thoroughly drained, and if the bodies are not buried within six feet of the surface of the ground, I do not believe there is any danger of its affecting the health of the neighborhood.*"

Dr. Manning Simons, of Charlestown, S. C., states:

"For two years I was physician to a dispensary,

which included two of the largest wards in the oldest part of the City of Charleston, and contained within its limits four cemeteries; but during that time I saw no cases of disease the origin of which I could trace to proximity to these localities."

In Savannah, Ga., the inquiries were submitted to the local medical society, and the members of that society were unanimous in the statement that they had never observed any instance in which sickness appeared to be induced or aggravated by the proximity of dwellings to cemeteries.

The report contains analyses of several samples of water taken from wells in the neighborhood of cemeteries, the result of which is thus stated on page 300:

> "If any deduction may be drawn from so limited a number of analyses, it is this: that wells in or near cemeteries (unless *very* near to graves, as in No. 6) enjoy an especial immunity from contamination, inasmuch as their position renders them less likely than others to be tainted by privies, drains and cesspools."

In conclusion upon the entire subject the writer states:

> "In summing up this investigation, we cannot avoid the conclusion that, as far as it goes, *it shows that any injurious influence exerted upon the public health by burial grounds, as at present managed in this State, as well as throughout the United States, is almost unknown; and that this, compared with the ordinary causes of disease, which exist about every dwelling, is utterly insignificant. In other words, a living man in sound health is*

far more to be dreaded as a disease-producing agent, than is a dead man buried with ordinary care." * * *

And again at page 310, paragraphs 4 and 6:

"Burial in contracted spaces of ground, in the midst of cities and villages, as practised by all Christian nations from very early times until a period comparatively recent, and not yet wholly discontinued, has been repeatedly proved injurious to the health of the community, in proportion as such spaces of ground are overcrowded with bodies. This malign influence is most apparent during epidemics, when the mortality in the vicinity of these burial grounds has been frequently observed to be excessive."

"Burial, as now practised in Massachusetts, is partly extra-mural and partly intra-mural. Regulations in regard to the depth of graves, their distance apart, and distance from dwellings and wells, are less stringent than in several European countries; but boards of health are empowered to prevent burial-grounds from becoming nuisances. *Any injury to health, even where the grounds are located in the midst of populous towns and villages, is in this State an almost unheard of occurrence.*"

In "an essay * * * on yellow fever, with observations concerning febrile contagion", by DR. EDWARD N. BANCROFT, published at Baltimore in 1821, the writer (at page 93) cites in proof of the fact that effluvia from human remains could not produce contagion, certain "facts, on a large scale, which completely decide the question." The facts referred to are the exhumations made in the churchyard of St. Eloi,

at Dunkirk, in 1783, and those made three years later in the churchyard of the Saints Innocents at Paris. In the latter case nearly twenty thousand bodies, in different stages of putrefaction, were removed. Part of the work was carried on during the greatest heat of summer. While the operations were "begun with every possible care, and with every known precaution, they were afterwards continued, almost for the whole period of the operations, without employing, it may be said, any precaution whatever; yet no damage manifested itself in the whole course of our labors—no accident occurred to disturb the public tranquility." The accounts of this work to which Dr. Bancroft refers are taken from official reports by M. Thouret (physician) and M. Fourcroy (chemist) under whose superintendence it was performed.

The foregoing authorities establish the scientific fact that whatever unhealthy conditions have heretofore arisen from cemeteries, have been due to the improper or negligent conduct of the same, rather than to any inherent danger resulting from burials when properly conducted.

The authorities proceed by different methods of reasoning, but reach the same result, viz.: that the danger of a properly conducted cemetery to the health of neighboring inhabitants, even when established in a city, is entirely insignificant when compared to the danger to health arising from the ordinary occupations of human activity. As stated in the Massachusetts report, "A living man in sound health is far more to be

dreaded as a disease-producing agent, than is a dead man buried with ordinary care."

The reasoning of Dr. Robinet and many of the other foreign authors is scientific. They follow the results of decomposition of animal matter, and show that when such decomposition takes place beneath the surface of the soil, any danger to health resulting therefrom is imaginary, and popular belief to the contrary is the result of prejudice and an elementary knowledge of chemistry and physics.

The method followed by the investigator for the Massachusetts Board of Health, and some of the French writers, is empirical. As a result of investigation of the actual experience of a large number of medical and scientific men, the same result is reached as that announced by Dr. Robinet and others from the other method of investigation, and as far as Massachusetts is concerned the final conclusion is that, "*Any injury to health, even where the grounds are located in the midst of populous towns and villages, is, in this State, an almost unheard of occurrence.*"

The authorities above cited show further that any possible danger to health which might result from burials within cities, can be obviated by the observance of proper regulations as to soil, depth of interments, spaces about the graves and distance from water supplies. With regard to such regulations attention is called to the allegations of the bill of complaint in the case at bar as to the conditions of complainant's cemetery.

It is therein stated:

"That at all times since the establishment of said cemetery, the plaintiff and its predecessors and the lot owners therein, have observed and performed all and every of the rules, regulations and requirements established by the said municipal corporation and by the Board of Health therein concerning the interment of bodies in such cemetery, and the care of such property as and for the purposes of a cemetery; and that they, the plaintiff and its predecessors and the lot owners therein have exercised at all times since the establishment of said cemetery, care and diligence to maintain the same and all parts thereof, so that the same could not become objectionable in any way, or be chargeable with neglect of any precautions to protect the sanitary conditions of the neighborhood in which said cemetery is situated, and of said City and County of San Francisco." * * *

"That the soil of said cemetery is sand, and the natural condition and character thereof is such that no dangerous or disease-breeding elements can be transmitted through the same from the decaying remains of bodies buried therein."

"That since the establishment of said cemetery, many residences have been built in its neighborhood, and the same have been and are now occupied with families, and yet it has not been proven that the district embracing said cemetery and said residences was unhealthy or subject to epidemics; but on the contrary, the said district has always been, and is now regarded as particularly healthy and free from the diseases which prevail in other parts of said city and county." * * *

"And plaintiff further avers that there have never been, and are not now, any wells excavated in the neighborhood of said cemetery for the

purpose of supplying water to any of the residences of families residing therein, or for consumption of human beings."

It thus appears that the soil of complainant's cemetery is sand, which is recognized by the authorities as being the best possible medium for the destruction of any deleterious elements which might escape from decaying human remains; that no wells for the supplying of water to inhabitants are in use in the neighborhood; that all proper regulations and precautions to protect the sanitary conditions of the neighborhood have been observed; and that the neighborhood in which complainant's cemetery is situated has always been, and is now regarded, as particularly healthy and free from the diseases which prevail in other parts of the City and County.

It is also to be noted that under the provisions of Section 3025 of the Political Code of California (hereinafter referred to) burials of adults are required to be made at least six (6) feet below the surface of the ground, and those of children at least five (5) feet below the surface.

If the regulations heretofore prescribed for the manner of burials of human remains in San Francisco are insufficient in any respect to fully protect the health of the community it would be entirely competent for the proper authorities to prescribe any further necessary regulations and in that manner to avoid any possible danger, rather than to entirely prohibit a necessary occupation which can be conducted without sanitary danger.

This leads to the consideration of our next point.

PROHIBITION OF BURIALS IS UNREASONABLE AND BEYOND THE NECESSITIES OF THE CASE, IF POSSIBLE DANGERS CAN BE AVOIDED BY REGULATION OF BURIALS WITHOUT ABSOLUTE PROHIBITION.

In the case of

Los Angeles vs. *Hollywood Cemetery Association*, 124 Cal. 349,

The Supreme Court of California held that

> "It is not unlawful to establish a cemetery for the burial of the dead, deriving profit therefrom as a business enterprise. To provide for the repose of the dead is as lawful as to provide for the comfort of the living. There are reasons why the burial of the dead should be subject to reasonable regulation which may not justify similar restrictions or regulations as to the homes of the living; but we can see no more reason why the right to establish cemeteries in a county should be subject to the will of the supervisors than that the right to engage in any other lawful enterprise should be so circumscribed. There is a wide difference between regulation and prohibition—between regulatory provisions as a condition imposed for the exercise of a lawful occupation, and making the right itself to depend upon the unrestrained will of the municipality."

The above is said with regard to an ordinance prohibiting the establishment of further cemeteries in an entire county. It is held, however, in the case at bar, that the different conditions existing in a city justify prohibition of burials there which would not be proper in a county. We submit that the warrant for

the exercise of the police power is the preservation of the public health, and that if it can be shown that the regulations which are admittedly sufficient for this purpose in rural districts will accomplish the same results in a city, the entire prohibition is beyond the necessities of the case, and therefore, unreasonable. The rule is thus stated in

Freund on Police Power, p. 132, sec. 141:

> "Where the power is only to declare and abate nuisances, it is properly restricted to nuisances in fact; where a power is given over a subject-matter that may tend to give rise to nuisances, the charter will usually express whether it is a power to regulate or to suppress. In the absence of such expression it would seem that the city should have power to forestall the nuisance by keeping the danger altogether away from its territory, provided such course is in accordance with the customary practice of municipalities; *and provided that regulation is not equally efficient, for then prohibition would be oppressive and unreasonable.*"

The point here urged was recognized by Judge Hunt as one of the reasons which controlled his decision in

Hume vs. *Laurel Hill Cemetery*.

In that case it is said (142 Fed. Rep. 565-566):

> "Like many other businesses, a cemetery may be so conducted as to become a nuisance; but to prevent any such danger there is a full power of regulation under the law, which may be exercised in a way to compel the owners of the cemetery to

conform to any rules conducive to public health in the matter of the interment of the dead. Let it be understood that a court will not abridge the legitimate exercise of police power, by limiting its use, where it has been exercised over those things reasonably essential to public safety, health, or morals, and where a public nuisance is to be destroyed, or where general public interest might, in the reasonable exercise of the discretion of the local authority, justify protection. There is a very large power to act for such interests. But the courts do maintain that such power shall not be arbitrarily exercised, and they will interfere wherever a case is presented which clearly does not involve the health or safety or comfort of the public. Here, as said, it is apparent that there is no attempt at regulation. Under the pleading, the ordinance amounts to the interdiction of a lawful business in the face of the fact that there is no impairment of, or danger to, either the health, safety, convenience or comfort of the public. *It therefore is an unwarranted and arbitrary prohibition and an ordinance which arbitrarily prohibits a lawful calling, without endeavor to regulate, is unreasonable and should be declared void.*"

"It is undoubtedly true that the cemetery association, when it was originally given its grant, was subject to the inherent police power of the state and the municipality; but this general rule cannot be extended to justify use of the power by denying the right to carry on a lawful business, unless conditions exist which bring it within a cause authorizing the exercise of the power. Nor can it be disputed that the police power may be lawfully exercised with reference to cemeteries, as it may with reference to vaccination, to hours of

labor, to the restrictions of objectionable trades, to the prohibition of gambling, to the sale of liquor, and many other matters, where, in the discretion of the local authority, the interests of the public require protection; but an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business and to use and enjoy property will not be upheld, though had under an ordinance apparently pertaining to police power. If it is arbitrary, there arises a case where scrutiny and supervision by the courts may be had to ascertain and decide whether the legislative right of a reasonable exercise of such power has or has not been exceeded. Manifestly, if the police power, even in respect to matters said to involve the public health, is permitted to go unlimited and is unquestionable, the rights of the citizen may always be subjected to the will of a municipal government, destructive though such will might be of the right to pursue a lawful business in a lawful way."

In other jurisdictions public authority has prescribed regulations establishing the distance which must intervene between cemeteries and human habitations. In England this distance is fixed at one hundred (100) yards, as appears from the following extract from a "Memorandum on sanitary requirements of burial grounds", published in London in 1908 by the Local Government Board:

"With regard to the minimum distance which should intervene between burial grounds and human habitations, section 9 of the Burial Act, 1855 (as amended by section 1 of the Burial Act, 1906), prescribes that no burial ground not in use at that date shall be used for burials under that

Act within a distance of 100 yards from any dwelling house (not being a dwelling house erected or completed after any part of the ground has been so used or appropriated) without the consent in writing of the owner, lessee, and occupier of such dwelling house. And by section 10 of the Cemeteries Clauses Act, 1847 (as amended by section 2 of the Burial Act, 1906), which is incorporated with the Public Health (Interments) Act, 1879, a cemetery provided under those Acts is not to be constructed nearer to any dwelling house than 100 yards, except with the consent in writing of the owner, lessee, and occupier."

"It may be taken that the above distance is amply sufficient to prevent any injury arising to the health of occupants of dwelling houses from a well-kept burial ground, so far as regards noxious matters transmitted through the air, but burial grounds will not in all cases, and at all times, be distant 100 yards from the nearest human habitation. With the consent of the owners, lessees, and occupiers of existing houses, a burial ground may be established within the prescribed limits; and it is, of course, competent to anyone afterwards to erect a new house as near to a burial ground as he pleases. *It does not appear, however, that any serious amount of danger to health is to be feared from proximity to a well-kept burial ground.*"

In France the prescribed distance is one hundred (100) meters (about 328 feet). The author of the article on "Cimetiere: Hygiene publique" in "La Grande Encyclopedie" (Paris), seems to be of the opinion that this official distance is sufficient for the

protection of health, and that the further isolation of cemeteries is not necessary. He says (translation):

"European nations for a long time knew only one mode of burial; inhumation, and French law has determined with great precision all the conditions which must govern this inhumation. * * * The question of cemeteries is one of those which require the most lively attention of the municipalities of the great cities; it is indeed most complex. The piety of the faithful has in spite of the rules of hygiene, led to the placing of the dead partly in the churches themselves and partly, for the less fortunate, around the buildings, that is to say, in the very center of the population. Nevertheless wiser ideas have prevailed and the decrees of June 12, 1804, completed by other decrees and resolutions, have established the rules which ought to govern the establishment of cemeteries. They had to be placed at a distance of 35 to 40 metres at least from habitations. Since then it was forbidden to dig wells or raise houses at least 100 metres from the cemeteries. (7 March, 1808.) Certain hygienists, going beyond the administrative rules, demand that they should be isolated at a distance of 1000 to 1500 metres. Have these measures a good reason, or, in other words, do cemeteries constitute a danger for their neighborhood? In certain cemeteries which are badly kept or placed in the most defective conditions, nauseous odors have been noticed (Fleck in Dresden); and Hugenot, in 1771, spoke of the 'malign' vapors which are exhaled from the charnel of the Innocents. These exceptional cases suffice nevertheless to plead for the isolation of cemeteries, although the gases which escape from the soil, which are composed especially of car-

bonic acid, ammonia, with traces of hydrogen, combined either with carbon, sulphur, or phosphorous, are in a state of too much dilution to have toxic effects. As to the microorganisms, the purifying power of the soil is such that they can not come to the surface, and Miquel has proved indeed that the air of the cemetery of Montparnasse is not more rich in bacteria than the air of the park of Montsouris, all of which leads Miquel to the somewhat risky opinion that intra-urban cemeteries planted with trees are a means of sanitation for cities. The placing of the cemetery opposite a town, its orientation, has then no importance."

THE REPORT OF THE BOARD OF HEALTH FOR THE STATE OF CONNECTICUT for the year 1889 contains a discussion of the regulation of cemeteries. After commenting upon the condition of the London graveyards as they formerly existed, and the danger arising from the burial of bodies, layer upon layer (p. 33), the report proceeds as follows:

"While the above conditions are obviously sources of danger to the public health, it seems evident that the interment of the dead in the ground can be practised with entire safety to the living, if due attention is given to the four following conditions:

"1. Suitable soil with proper facilities for drainage.

"2. Suitable location in respect to houses and water sources.

"3. Sufficient space.

"4. Proper regulation and management."

The regulation of the four conditions named is then

given separate consideration. With the regard to space around a cemetery it is stated:

> "It may be taken that a distance of 200 yards is amply sufficient to prevent any injury arising to health from a well kept cemetery, so far as regards noxious matters transmitted through the air."

In the case at bar the only information supplied by the record as to the proximity of residences to complainant's cemetery is the following allegation of the bill of complaint:

> "That since the establishment of said cemetery, many residences have been built in its neighborhood, and the same have been and are now occupied with families, and yet it has not been proven that the district embracing said cemetery and said residences was unhealthy or subject to epidemics; but on the contrary, the said district has always been, and is now regarded as particularly healthy and free from the diseases which prevail in other parts of said city and county."

There is nothing in the record to indicate whether these residences are distant one hundred feet or a quarter a mile or more from complainant's cemetery. If, however, the Board of Supervisors had considered that residences were approaching too closely to the graves, or that the latter existed in too close proximity to residences, all possible danger could easily have been removed by a regulation that graves within a specified distance of human habitations should be abandoned or removed. If any danger does exist, it certainly does not extend to all parts of the City and

County. The reasonable course to have pursued would have been to establish a distance which must intervene between graves and residences. Anything further is unreasonable. Prohibition of business throughout the length and breadth of the City and County cannot be reasonable, unless the alleged danger is coextensive with the limits of the prohibition. Even the most ardent advocate of the danger to health arising from the decay of human remains could not contend that such alleged danger extends throughout the entire city, in the absence of any effect on water supply. The latter element is removed from this case by the allegation that there are no wells in the neighborhood of complainant's cemetery. If any danger results from this cemetery it must be by contamination of the air or the soil. It is shown by authorities hereinabove cited that the danger from those sources is very slight, if it exists at all, and cannot extend for any considerable distance. All possible danger could have been avoided by regulation; prohibition is therefore void.

The statutes of California contain several enactments regulating the manner of burial of human remains. The Political Code contains the following sections:

> "Sec. 3012. General Powers of Board of Health. The board of health have general supervision of all matters appertaining to the sanitary condition of the city and county, including the city and county hospital, the county jail, almshouse, industrial school, and all public health institutions provided by the city and county of San Francisco; and may adopt such orders and regu-

lations, and appoint or discharge such medical attendants and employees, as to them seems best to promote the public welfare; and may appoint as many health inspectors as they deem necessary in time of epidemics."

"Sec. 3025. No Bodies to be Interred without Permit. No person shall deposit in any cemetery, or inter in the city and county of San Francisco, any human body, without first having obtained and filed with the health officer a certificate signed by a physician or midwife, or a coroner, setting forth, as near as possible, the name, age, color, sex, place of birth, occupation, date, locality, and the cause of death of the deceased, and obtain from such health officer a permit; nor shall any human body be removed or disinterred without the permit of the health officer, or by order of the coroner. Physicians, when deaths occur in their practice, must give the certificate herein mentioned. Hereafter it shall be the duty of the assistant city physician, or police surgeons, to perform all autopsies which may be required in the coroner's office of the city and county of San Francisco, all such autopsies being made without charge to the city. It shall be the duty of the health officer to see that the dead body of a human being is not allowed to remain in any public receiving vault for a longer period than five days. At the expiration of that time he shall cause the body to be placed in a vault or niche constructed of brick, stone, or iron, and hermetically sealed. It shall also be his duty to require all persons having in charge the digging of graves and burial of the dead to see that the body of no human being who had reached ten years of age *shall be interred in a grave less than six feet deep,*

or, if under the age of ten years, the grave to be not less than five feet deep."

"Sec. 3026. Return of Interments to be Made. Superintendents of cemeteries, within the boundaries of the city and county of San Francisco must return to the health officer, on each Monday, the names of all persons interred or deposited within their respective cemeteries for the preceding week."

"Sec. 3027. Bodies not to be removed without permit. No superintendent of a cemetery can remove or cause to be removed, disinter or cause to be disinterred, any corpse that has been deposited in the cemetery, without a permit from the health officer, or by order of the coroner."

The matter of disinterments is regulated by an exhaustive act of the Legislature requiring a permit from proper authority for such purpose, and prescribing detail regulations under which such disinterment can be made.*

---

*An act to protect public health from infection caused by exhumation and removal of the remains of deceased persons. (Approved April 1, 1878; Stats. 1877-8, 1050. Amended 1889, 139.)

Disinterring of bodies unlawful without permit.

Section 1. It shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons so doing shall first obtain, from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose. Nor shall such body or remains disinterred, exhumed, or taken from any grave, vault, or other place of burial or deposit, be removed or transported in or through the streets or highways of any city, town, or city and county, unless the person or persons removing or transporting such body or remains shall first obtain, from the board of health or health officer, (if such board or officer there be), and from the mayor or other head of the municipal government of the city or town, or city and county, a permit, in writing, so to remove or transport

That act is found in Statutes of 1877-8, page 1050, Deering's General Laws, Act 545 and Henning's General Laws, page 505, and is printed in full in the margin.

The removal of dead bodies without a permit is also made a crime by Sections 290-291 of the Penal Code, which are also printed in the margin.[1]

Under the provisions of the Charter of San Francisco, hereinafter referred to, the sanitary supervision of the disposition of the dead is vested in the municipal Board of Health.

It appears therefore that the California Statutes have regulated the burial of human remains in many particulars, and that the entire matter is by the municipal charter placed under the charge of the Department of Health. In order to justify the ordinance attacked in the case at bar, it must be held that both the existing

---

such body or remains in and through such streets and highways.

Permits granted upon what.

Sec. 2. Permits to disinter or exhume the bodies or remains of deceased persons, as in the last section, may be granted, provided the person applying therefor shall produce a certificate from the coroner, the physician who attended such deceased person, or other physician in good standing cognizant of the facts, which certificate shall state the cause of death or disease of which the person died, and also the age and sex of such deceased; provided further, that the body or remains of deceased shall be inclosed in a metallic case or coffin, sealed in such manner as to prevent, as far as practicable, any noxious or offensive odor or effluvia escaping therefrom, and that such case or coffin contains the body or remains of but one person, except where infant children of the same parent or parents, or parent and children, are contained in such case or coffin. And the permit shall contain the above conditions and the words: "Permit to remove and transport the body of ————————, age ——, sex ————." and the name, age and sex shall be written therein. The officer of the municipal government of the city or town, or city and county, granting such permit, shall require to be paid for each permit the sum of ten dollars,

regulations and any further regulations which might be enacted or prescribed by the proper authorities would be inadequate to prevent any threatened danger to health. If such regulations will meet the necessities of the case, the entire prohibition of burials is unreasonable and therefore void.

In the recent case of

> *Lochner* vs. *New York*, 198 U. S. 45, 49 L. Ed. 937,

it was held that an attempt to limit the hours of labor of bakers was invalid; that all that could be done by the legislative body had been done by regulations. It is there said:

> "All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the in-

---

to be kept as a separate fund by the treasurer, and which shall be used in defraying expenses of and in respect to such permits, and for the inspection of the metallic cases, coffins, and inclosing boxes herein required; and an account of such moneys shall be embraced in the accounts and statements of the treasurer having the custody thereof.

Misdemeanor.

Sec. 3. Any person or persons who shall disinter, exhume or remove, or cause to be disinterred, exhumed, or removed, from a grave, vault, or other receptacle or burial-place, the body or remains of a deceased person, without a permit therefor shall be guilty of a misdemeanor and be punished by a fine not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment. Nor shall it be lawful to receive such body, bones, or remains on any vehicle, car, barge, boat, ship, steamship, steamboat, or vessel for transportation in or from this state, unless the permit to transport the same is first received, and is retained in evidence by the owner, driver, agent, superintendent, or master of the vehicle, car, or vessel.

spection of the premises where the bakery is carried on, with regard to furnishing proper wash rooms and water closets, apart from the bake room, also with regard to providing proper drainage, plumbing, and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of that nature; alterations are also provided for, and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be

---

Transportation of bodies exhumed without permit.—Misdemeanor.

Sec. 4. Any person or persons who shall move or transport, or cause to be moved or transported, on or through the streets or highways of any city or town, or city and county, of this State, the body or remains of a deceased person, which shall have been disinterred or exhumed without a permit, as described in section two of this act, shall be guilty of a misdemeanor, and be punishable as provided in section three of this act.

Reward for information.

Sec. 5. Any person who shall give information to secure the conviction of any person or persons for the violation of the provisions of this act shall be entitled to receive the sum of twenty-five dollars, to be paid from the fund collected from fines imposed and accruing under this act.

Removal of remains of deceased persons.

Sec. 6. Nothing in this act contained shall be taken to apply to the removal of the remains of deceased persons from one place of interment to another cemetery or place of interment within this state: provided, that no permit shall be issued for the disinterment or removal of any body, unless such body has been buried for one year or more, without the written consent of the mayor, chairman of the board of supervisors, or city council of any municipality of the state. (Amendment approved March 13, 1889; Stats. 1889, 139. In effect immediately.)

Sec. 7. This act shall take effect and be in force from the thirtieth day after its passage and approval.

conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution."

THE POLICE POWER VESTED IN THE BOARD OF SUPERVISORS OF SAN FRANCISCO IS A POWER TO ABATE NUISANCES AND TO REGULATE SUCH OCCUPATIONS AS ARE NOT NUISANCES.

The source of the municipal police power in California is found in Article XI, Section 2 of the State Constitution, which reads as follows:

> "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other *regulations* as are not in conflict with general laws."

The Charter of the City of San Francisco, in Ar-

[†]Sec. 290. Unlawful mutilation or removal of dead bodies. Every person who mutilates, disinters, or removes from the place of sepulture the dead body of a human being without authority of law, is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment.

Sec. 291. Unlawful removal of dead body from grave for dissection, etc. Every person who removes any part of the dead body of a human being from any grave or other place where the same has been buried, or from any place where the same is deposited while awaiting burial, with intent to sell the same or to dissect it, without authority of law, or from malice or wantonness, is punishable by imprisonment in the state prison not exceeding five years.

ticle II, Chapter II, Section 1, contains the following provisions:

> "Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power:
>
> "1. To ordain, make and enforce within the limits of the City and County all necessary local, police, sanitary and other laws and regulations.
> * * *
>
> "6. To provide for the abatement or summary removal of any nuisance and to condemn and to prevent the occupancy of unsafe structures."

Article X of the same charter is devoted entirely to the Board of Health. It is there provided in Section 3 as follows:

> "Sec. 3. The Board shall have the management and control of the City and County Hospitals, Almshouses, Ambulance Service, Municipal Hospitals, Receiving Hospitals, and of all matters pertaining to the preservation, promotion and protection of the lives and health of the inhabitants of the City and County; *and it may determine the nature and character of nuisances and provide for their abatement.*
>
> "It shall have the sanitary supervision of the municipal institutions of the City and County, including jails, schoolhouses, and all public buildings; *of the disposition of the dead;* of the disposition of garbage, offal and other offensive substances."

It will be noted that no express power of abatement or suppression is conferred by the charter except as to nuisances. The evident intent of the charter framers was to confer upon the supervisors by paragraph

one (*supra*) authority to regulate all occupations which are not nuisances, and by paragraph six to confer authority to abate nuisances. The power of regulation is further limited by the use of the word "necessary". Under this provision no unnecessary regulation is authorized, and the Courts are the judges of the necessity.

The Board of Health is also given the power to "determine the nature and character of *nuisances*, and provide for their abatement." To this power to abate nuisances is coupled the power of the sanitary supervision of sundry matters, including "the disposition of the dead." Here again it is plain that sanitary regulation is the extent of the power until it shall be determined that a nuisance exists, in which latter case it may be abated. The health of the public is to be protected *by regulation* when that will suffice, and when it will not, abatement or prohibition is to be resorted to. Prohibition of everything having a dangerous tendency is an easy method of avoiding responsibility as to regulation; but constitutional guaranties cannot thus be swept aside. Whenever threatened danger can be removed by restrictions, or regulations, without entire prohibition, the latter course is manifestly oppressive, unreasonable and invalid.

> "A power to regulate does not properly include a power to suppress or prohibit, for the very essence of regulation is the existence of something to be regulated."
>
> 24 Am. & Eng. Ency. of Law (2d ed.), pp. 243-244.

The above is quoted in

Ex Parte Patterson, 42 Tex. Crim. Rep. 256, 58 S. W. Rep. 1011,

Where it is said:

> "The power to regulate includes the power to restrain, so long as the restraint imposed is reasonable. The restraint must not so confine the exercise of any occupation as to amount to a prohibition. Horr & Bemis Municipal Ordinances, Sec. 30."

In

McConvill vs. *Jersey City*, 39 N. J. Law, 44,

it was held that power to regulate and control the driving of cattle through the street cannot mean to prevent such driving altogether.

In

City of Austin vs. *Austin Cemetery Association*, 87 Tex. 330,

one of the questions involved was the reasonableness of an ordinance prohibiting burials. The Court said:

> "To regulate an act implies that the act shall be permitted, but that it may be controlled by reasonable restrictions as to the manner and circumstances of its performance."

The foregoing cases and others are reviewed with approval by the Supreme Court of the State of Michigan in

In re Hauck, 70 Mich. 390.

The Court there say (p. 408):

> "In *State* vs. *Mott*, 61 Md. 297, the city of Baltimore was given power to—

"'Regulate the places for manufacturing soap and candles, and erecting slaughter-houses and distilleries, and where every other offensive trade is carried on.'

"The council passed an ordinance prohibiting the operation within the city of kilns for burning oyster shells and stone lime. It was held that the ordinance was unauthorized, and the Court, speaking of the power to regulate, said:

"'That power assumes the existence of such trades, and that they may be carried on within the limits of the city. The power delegated is simply to regulate the places where they are carried on, and not to forbid their being carried on, or to destroy them altogether.'

"And it was further held, that, so long as such trades were conducted and carried on in such manner as not to render them nuisances, it is well settled that the power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation.

"Other authorities might be cited to show that to 'regulate' is not the same as to 'prohibit', but is essentially different."

The same views are again announced with reference to a city ordinance, purporting to be enacted under the police power, prohibiting street parades, in

In re Frazee, 63 Mich. 396.

The Court there say (pp. 403-404):

"It is quite possible that some things have a greater tendency to produce danger and disorder in the cities than in smaller towns, or in rural places. This may justify reasonable precautionary measures, but nothing further; and no infer-

ence can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. *That which is an actual nuisance can be suppressed just so far as it is noxious, and its noxious character is the test of the wrongfulness.* There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions; but most dangerous things are not so different in cities as to require more than increased or qualified safeguards, *and to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them, is not a process tolerated under free institutions. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power.*"

A MERE TENDENCY TO ENDANGER THE HEALTH OF THE PUBLIC IS NOT A SUFFICIENT WARRANT FOR THE PROHIBITION OF A LAWFUL BUSINESS.

In its decision in the case at bar the California court has held:

> "Where a cemetery in which it is proposed to make interments is located in a thickly settled community, further interments therein may be prohibited, because the burial of dead bodies in close proximity to the habitations of the living has a *tendency* to endanger the health of large numbers of persons."

The conduct of many lawful and necessary occupations and activities of the public is accompanied by a

tendency to endanger the lives of a large number of persons. No assemblage of the public in hall, theater, or church is free from danger to the health of those so assembled. The crowding of street cars and other conveyances involves great danger to health by the transmission of disease, the exhalation of carbonic acid gas, and other causes. The operation of automobiles, trolley cars, and even steam railroads and steamboats has a considerable tendency to endanger the lives of a large number of persons. Portions of the public are constantly engaged in occupations in which danger is inherent. It cannot be successfully contended that all of the above occupations and activities could be absolutely prohibited by the mere fiat of a legislative body, simply because they involve a *tendency* to endanger the health of the public.

It is submitted that the correct rule justifying the exercise of the police power in matters of this kind is what has been called the "law of overruling necessity." The application of this law to the prohibition of the further conduct of a cemetery is fully discussed in the case of

> *Town of Lakeview* vs. *Rosehill Cemetery Company*, 70 Ill. 191, 22 Am. Rep. 71.

In that case the Town of Lakeview sought to restrain the cemetery company from further use of its lands for the burial of the dead. The Court say:

> "The validity of the legislation restricting the cemetery company from enlarging its grounds is the principal question in the case. While appellee claims its charter is in the nature of a contract that the State cannot rescind or impair, it is con-

ceded the State has the power to control the use of its lands for burial purposes, so that its use may not injuriously affect the health of the community, but the right to prohibit the company altogether from its use for the objects designated in the charter is denied. * * * Without reference to the definitions given by law-writers and courts, of what is termed the police power of the State, in its more comprehensive sense, in its applications to the various relations of communities, when applied to matters like the subject of this litigation, it may be assumed that it is a power co-extensive with self-protection, and is not inaptly termed the 'law of overruling necessity.' It may be said to be that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society. It may be used to control the use of property of corporations as well as of private persons. * * *

"There is nothing in nature but may be the instrument of mischief, and the burial of the dead may be so done as to be most injurious in its consequences to the people in the vicinage. But that is not the question in the case at bar. By this act of the general assembly, it was intended to prohibit, absolutely, the use of the grounds by the company for burial purposes. The act of granting the charter was itself a legislative construction that a cemetery is not necessarily a nuisance, if the grounds are well selected, and interments made with proper care. That it might become so, through misconduct, no one doubts. The general assembly has the right to pass laws to regulate interments to prevent injury to the health of the community, and notwithstanding the company, in this instance, is exercising franchises conferred by

> the State, it is within legislative control in this regard. * * * In the case at bar, by the provisions of its charter, the company was authorized to buy and hold land not exceeding a certain quantity and to use it for cemetery purposes. This it can rightfully do, and while the State has *the unquestionable power to regulate the manner of its use,* so far as it may injuriously affect others, it cannot, under the pretense of making police regulations, repeal its charter and revoke its franchises, *or deprive the company of any of the essential rights conferred by its charter.* * * * Under the power to regulate, the State cannot deprive the citizen of the lawful use of his property, if it does not injuriously affect or endanger others."

It was therefore held in the above case that the cemetery company could not be entirely prohibited from using its lands for burial purposes.

In this connection the remarks of Mr. Justice Holmes, while sitting in the Supreme Court of Massachusetts in the case of

> *Miller* vs. *Horton,* 152 Mass. 540,

are pertinent. Speaking as to the right to recover damages by the owner of a horse which was killed under an order of the commissioners for the prevention of the spread of disease among domestic animals, it is said:

> "Still it may be asked, If self-protection required the act, why should not the owner bear the loss? *It may be answered, that self-protection does not require all that is believed to be necessary to that end. It only requires what is actually necessary. It would seem doubtful at least,*

whether actual necessity ought not to be the limit when the question arises under the Constitution between the public and an individual."

The reasoning in a recent decision of this Court is applicable to this subject of a mere tendency to endanger health, viz.:

Lochner vs. *New York*, 198 U. S. 45, 49 L. Ed. 937.

In that case a law of the State of New York limiting employment in bakeries to sixty hours per week and ten hours per day, was held to be an invalid attempt of the exercise of the police power to protect the public health, safety, morals or general welfare. Replying to the argument that the occupation of a baker was inherently unhealthy and to the opinion of one of the judges of the Court of Appeals that the Court could take judicial notice of that fact, this Court said (p. 59):

> "We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others,

but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. *It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.* It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinet maker, a dry goods clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Under the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight

hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts."

Applying the above reasoning to the facts in the case at bar, it is apparent that a mere tendency to endanger health is not a sufficient warrant for the supremacy of police power regulation or prohibition over constitutional guaranties. We are thus brought back to the fundamental question in this case, viz.: Are any facts established by the pleadings or the judicial knowledge of the Court which warrant the finding that the total prohibition of burials, rather than the existing or additional regulations, is necessary to protect the health of the public? It is a question of *actual necessity* and not of mere possibility or tendency to danger.

COMPLAINANT IS ENTITLED TO BE HEARD UPON THE QUESTION AS TO WHETHER OR NOT "THE BURIAL OF THE DEAD WITHIN THE CITY AND COUNTY OF SAN FRANCISCO IS DANGEROUS TO LIFE AND DETRIMENTAL TO THE PUBLIC HEALTH."

The decisions of this Court and of the Supreme Court of California upon the validity of ordinances prohibiting the manufacture of gas are important in this connection. In

Dobbins vs. *City of Los Angeles*, 139 Cal. 179,

it was held that courts could not question the validity of a police ordinance prohibiting the further manufacture of gas in the City of Los Angeles. In reversing that decision this Court held that the Court could look beyond the face of the ordinance and examine all the conditions and circumstances upon which it bears. (195 U. S. 223.)

While the appeal in the above case was pending it was held by the California Court that the attempted prohibition of the manufacture of gas in an entire county was an invalid attempt of the exercise of the police power. The difference between ordinances of this character as applied to cities and those applied to counties is thus stated:

> "As has been said, there must always be left a large discretion in the legislative body, with the exercise of which the courts will not and have no desire to interfere. Nor will they in any event interfere except where the case be plain that need-

less oppression is worked and constitutional rights invaded. But courts are not limited in their inquiry to those cases alone where such a situation is shown upon the reading of the statute. They will consider the circumstances in the light of existing conditions. In city ordinances, as distinguished from county ordinances, the interest and requirements for protection of a thickly settled and growing community will often be widely different from those of sparsely settled and thinly inhabited rural districts. An ordinance limiting, regulating, or even prohibiting, in a certain district within the corporate limits of a city, may be perfectly reasonable, where like limitations, restrictions, and prohibitions as to some district within the county, arbitrarily carved out, would be oppressive and unreasonable in the extreme. Owing to the peculiar conditions existing in cities, courts are not keen to question the wisdom of the legislative exercise of their police powers in these respects; but as the same conditions do not exist in the country, county ordinances, passed in the exercise of the same power, may well be scanned with more critical eye. And as it must happen in the case of many of these ordinances that the unreasonableness and oppression is not apparent upon the face thereof, evidence in such cases will be admitted to show the existing conditions. But this evidence will not go to motive. If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless. This is but in accordance with the well-settled rule, and for that reason the allegations touching the motive of the board of supervisors in passing

the ordinance here under consideration have been and are entirely disregarded. But in support of the proposition above declared, that the conditions and circumstances upon which the ordinance bears are proper subjects of evidence, may be cited: *Yick Wo* vs. *Hopkins*, 118 U. S. 356; *Tugman* vs. *Chicago*, 78 Ill. 405; *Oxanna* vs. *Allen*, 90 Ala. 468; *People* vs. *Armstrong*, 73 Mich. 288; *Ex parte Patterson*, 42 Tex. Crim. Rep. 256; *Cleveland etc. Railway Co.* vs. *Connersville*, 147 Ind. 277; *Pieri* vs. *Mayor etc. of Shieldsboro*, 42 Miss 493; *Town of Kosciusko* vs. *Slomberg*, 68 Miss. 469; *Corrigan* vs. *Gage*, 68 Mo. 541."

In re Smith, 143 Cal. 372-373.

It is respectfully submitted that the principles to be applied in determining the validity or invalidity of ordinances enacted under the police power are the same whether such ordinances apply to a city, a county, or to a combined city and county such as San Francisco. The ultimate question is: "Is the ordinance reasonable under all the circumstances?" The "conditions and circumstances upon which the ordinance bears" are just as proper subjects of evidence when the ordinance relates to city conditions as they are when it refers to county conditions. The existence of a cemetery in a city is not the only circumstance or condition which may or may not differentiate it from one situated in a rural district. Its location is one of the circumstances upon which the reasonableness of an ordinance effecting it is dependent, but it is not the only circumstance. A neglected or badly managed cemetery in the country may be a greater menace to health than a properly regulated one in the city. Unless *all*

the circumstances and conditions upon which an ordinance bears are apparent upon its face or within the knowledge of the Court, evidence upon any issue made thereon, and admissions of the pleadings, when not denied, should be considered.

The same difference between the construction of a county ordinance and a city ordinance, when applied to the prohibtion of burials, is shown by a comparison of the Hollywood case (124 Cal. 344) and the case at bar. This Court has held that the circumstances and conditions must be considered with regard to an ordinance prohibiting the manufacture of gas in a city, as well as in a county. The same rule must apply to the prohibition of burials. The distinction between city conditions and county conditions is no more conclusive with regard to burials than with regard to gas works. The authorities cited in *In re Smith, supra*, are sufficient warrant for an examination of all the circumstances and conditions in the case at bar.

In the decision in the Court below it is said:

> "We do not question the correctness of the principle that such circumstances may be shown as would make it unreasonable, even in a city, to absolutely prohibit burials everywhere within the city limits." (Record, p. 46.)

This is said with regard to sparsely inhabited tracts of land in cities, but it is a recognition of the principle that *all* the circumstances upon which the ordinance bears are proper subjects for consideration. The question in the case at bar is, "Is the absolute prohibition of burials reasonable *under all the circumstances*, as shown by the pleadings?

THE ORDINANCE IS UNREASONABLE FOR THE REASON THAT IT PROHIBITS BURIALS UPON LARGE UNOCCUPIED TRACTS OF LAND.

The bill of complaint alleges in paragraph IX½ (Record, p. 26) as follows:

> "And plaintiff further shows and avers that there are within the corporate limits of the City and County of San Francisco several large tracts of land, some of which consist of barren sand-hills, and are entirely unoccupied, and some of which are used solely for farming purposes; that some of said tracts of land contain several hundred acres of land; and interments of dead bodies could be made on several of said tracts of land, and within the corporate limits of the City and County of San Francisco, which would be more than a mile distant from any human inhabitant or public thoroughfare."

With reference to these allegations the Court below has held (Record, pp. 46-47):

> "If the ordinance did in effect prohibit the interment of dead bodies upon any such tracts of land, it may be that it would be to that extent unreasonable, or at least that this allegation would tender an issue which would require the trial court to take proof to determine whether or not under all the circumstances the ordinance was unreasonable. But at the time this ordinance was adopted and for many years theretofore the Penal Code of this state contained a provision (sec. 297) making it a misdemeanor to bury or inter, or cause to be buried, any human remains in any place within the corporate limits of any city or town in this

state, or within the corporate limits of the city and county of San Francisco, 'except in a cemetery or place of burial now existing under the laws of this state and in which interments have been made, or that is now or may hereafter be established or organized by the board of supervisors of the county or city and county in which such city or town or city and county is situate.' By reason of the existence of this statute it was already, at the time of the passage of the ordinance in question, a misdemeanor to inter any dead body in any place within the City and County of San Francisco outside of the existing cemeteries, or those to be authorized by the supervisors. There is no suggestion that the establishment of new cemeteries was contemplated. The ordinance, therefore, *in effect merely prohibited the interment of bodies in existing cemeteries.* It is not alleged that any such cemeteries did in fact exist upon any of the vacant tracts of land referred to in the complaint. Indeed, the only cemetery described by the plaintiff is its own and that, as is shown by the allegations of the complaint itself, is situated in the midst of a thickly settled district."

In connection with this matter attention is called to the fourth reason set forth in the bill of complaint for which it is claimed that the ordinance is invalid. (Record, p. 29.) It is there stated that said ordinance is unreasonable because burials are prohibited upon lands owned or controlled by the city itself, to which this allegation is added:

"And plaintiff alleges and avers that by reason of the provisions of such order, last above mentioned, the same is unreasonable, and in that be-

half, plaintiff alleges that it is the duty of the said municipal corporation to provide proper places for the burial of its dead within its corporate limits, and that the said municipal corporation is without power and authority to compel other counties or municipal corporations to allow and permit the burial of the dead from said City and County of San Francisco to be had in such other counties or municipal corporations."

Prior to the enactment of the ordinance involved in this case it was possible for the municipality of San Francisco to dispose of its dead either in existing cemeteries, or, if that were considered unwise, in other cemeteries which might be established in the unoccupied portions of the City and County above referred to. This ordinance attempts to make the burial of the dead impossible either in the inhabited or uninhabited portions of the City. The prohibitions of the section of the Penal Code referred to did not prevent the Board of Supervisors from caring for the burial of the dead by the establishment of new cemeteries in the uninhabited portions of the City and County whenever they deemed it necessary. This right is taken away by the ordinance here involved. It is therefore this ordinance, and not the section of the Penal Code referred to, which deprives the authorities of San Francisco of the power to bury their own dead and compels such burial to be carried past unoccupied lands within the City and County to an adjoining county. It is unquestionably the duty of municipal authorities to provide for the burial of its dead somewhere. If it should be held that such burials are not proper in the

populous parts of the combined city and county it is nevertheless unreasonable for the authorities to attempt to force this duty upon the people of an adjoining county while there are unoccupied lands within its own borders. The Court will take judicial notice of the fact that San Francisco is surrounded by water on three sides and that the only adjoining land is on the south. If the authorities of this one contiguous county should decide that the burial of the dead within its borders was prejudicial to the health of its inhabitants, what is to become of the dead of San Francisco? It is certainly unreasonable to make the right of burial for all the inhabitants of a city of the size of San Francisco depend on the whim of the Board of Supervisors of the only adjoining county while there are lands within its own borders which admittedly can be used for burial purposes without any danger or imagined danger. The opinion of the Court below concedes that this would be true were it not for the fact that burials were prohibited except in existing cemeteries prior to the passage of this ordinance; but, as stated above, the right to establish new cemeteries within the city, existed until the passage of this ordinance. The fact that such cemeteries had not theretofore been established is immaterial, as the necessity therefor did not exist until this ordinance attempted to prohibit burials in existing cemeteries. A similar ordinance applying to the City of Portland, Oregon, was held unreasonable in

Wygant vs. *McLauchlan*, 39 Ore. 429, 64 Pac. Rep. 867.

The Court there said:

"Now, it is an admitted fact that there are considerable tracts of land, comprised within the limits of the city which are sparsely inhabited. As was said by the court below, 'there are within the corporate limits of the city of Portland several large tracts of land, which are used solely for farming purposes, some of them containing several hundred acres, and on some of them interments could be made which would be distant a half mile or more from any human inhabitant or public thoroughfare.' Under these conditions, it is assuredly not a reasonable regulation, as a police provision, or for the conservation of the health or good order of the community, to exclude burials from the whole territory, save the districts enumerated by the ordinance. If, however, as before indicated, the legislature had granted special and express power to exclude burials from within the city limits, the adoption of such an ordinance would be a legitimate exercise thereof, and no one could question its validity, yet, when the nature of the power delegated enjoins upon the city the duty of adopting such measures only as are reasonable, that becomes the measure and limit of the power, and any act in excess thereof is without legal efficacy. The ordinance being unreasonable as applied to those sparsely inhabited portions of the city, and general in its territorial scope and operation, it is invalid as to the whole, and must fall in its entirety."

THE ORDINANCE DEPRIVES COMPLAINANT AND ITS LOT OWNERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The bill of complainant in this case alleges the following facts:

The land now held by the complainant was conveyed to it upon condition that it should be used for cemetery purposes. (Record, p. 20.)

The statute under which complainant is incorporated provides that whenever any lots or plots in complainant's cemetery "shall be transferred to individual holders, and after there shall have been an interment in a lot or plot, so transferred, such lot or plot from the time of such interment shall be forever thereafter inalienable, and shall, upon the death of the holder or proprietor thereof, descend to the heirs at law of such holder, or proprietor, and to their heirs at law forever." (Record, p. 21.)

Since the establishment of complainant's cemetery forty-one thousand lots or plots have been sold by it to individual holders for burial purposes, a very large proportion of which are not so filled as to prevent further burials therein, but are capable of receiving a number of interments in addition to those already made therein. (Record, p. 22.)

The holders of these lots have expended in improving the same an amount in excess of the sum of $2,000,000. Such improvements are of a lasting and permanent character and have been made with the expectation of their permanent and continuous use for the purpose of their construction, and cannot be re-

moved from complainant's cemetery without great cost and in many cases without the total destruction of the same. (Record, p. 22.)

The holders and proprietors of such lots and plots have been induced to make these improvements by reason of the fact that the complainant is a mutual association, and by the provisions of the law under which it is incorporated is compelled to apply all the proceeds arising from sale of lots, plots and graves, other than such as is necessary for current expenses and the payment of indebtedness incurred by the purchase of its land, to the improvement, embellishment and preservation of its cemetery and to incidental expenses, and to no other purpose or object. (Record, pp. 22 and 23.)

It is apparent from the above allegations that the lands of complainant can be used for no purpose other that for the conduct of a cemetery; that the members of the complainant association have relied upon the provisions of the law under which they are organized as assuring to them the permanent use and care of the places which they have selected and improved as the final resting places for themselves and their families. The proper disposal of the remains of the dead is as sacred a duty as the care of the living. Provident heads of families have discharged this duty by arranging in advance for suitable burial places. Such property is valuable not only because it represents a large pecuniary investment, but also because it is hallowed by sacred memories and associations. To prohibit further burials in all of these lots is to greatly

impair if not to absolutely destroy their value. The right to the continued use of property for the purpose for which it has been acquired is an essential part of its value; and particularly so of property of the character of burial lots. The prohibition of the further use is a taking of the property of the members of complainant, both as individuals and as an association.

The enjoyment of this property is guaranteed to the complainant and its members by the fourteenth amendment to the Constitution, unless, indeed its destruction by public authority is necessary for the public safety. This Court has decided that the finding of the legislative body as to such necessity is neither final nor conclusive, and that the fact of necessity must be determined by the courts. Can this Court say from the record now before it, that such necessity exists? If it does not, the ordinance is void. Does the supposed danger to health actually exist? If it does, cannot the danger be averted by less drastic and more reasonable regulations?

The ordinance is invalid unless it appears "that the means are unreasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." (*Lawton* vs. *Steele*, 152 U. S. 137, 38 L. Ed. 388. Quoted with approval in *Dobbins* vs. *Los Angeles*, 195 U. S. 223, 49 L. Ed. 169.) "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action is a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class." (*Holden* vs. *Hardy*, 169 U. S. 398, 42 L. Ed. 793.)

THE QUESTION AS TO WHETHER OR NOT MODERN CEMETERIES ARE DANGEROUS TO THE HEALTH OF NEIGHBORING INHABITANTS HAS NEVER BEEN CONSIDERED OR DETERMINED BY ANY COURT.

Several decisions have assumed that cemeteries are unsanitary and have so declared. The basis of these decisions seems to have been the belief of the ancients that burials in cities were unhealthy. We have been unable to find any case in which the matter has been discussed or the nature of the alleged danger to health announced. In the case at bar the Supreme Court of California say:

> "That the interment of such bodies in the midst of thickly populated districts is likely to prove a danger to the health of the surrounding population, and as such may properly be prohibited, seems to be settled by a number of well-considered cases cited in the opinion in the Odd Fellows Cemetery case." (Citing several cases.)

Of the cases thus relied upon the one most frequently cited is

> *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377.

In that case injunctions were sought to prevent the forcible removal of dead bodies buried in a cemetery. It appeared that this particular cemetery had been abandoned. "The city was growing and becoming closely built around it, and as no income was derived from it by the churches, there was no means of keeping

it in proper order, and from its neglected condition it was rapidly becoming a nuisance to the neighborhood." It also appeared that the lot owners had no title to the land, but a mere license to bury as long as the land was used for cemetery purposes. Upon the question of the necessity for the removal of the bodies, and the prohibition of future burials the Court say (p. 423):

> "No one can doubt the power of the legislature to prohibit all future interments within the limits of towns or cities. In ancient times, in Greece and Rome such was the universal rule. It was one of the laws of the twelve tables, '*hominem mortuum in urbe ne sepelite neve vicinitate.*' It is much to be regretted that it was not adopted as our policy at an early period. This is no invasion of any right of property." * * * (P. 424.) "It has, accordingly, been always maintained that such laws and ordinances, as applicable to existing burial grounds, are constitutional and valid." (Citing New York and other cases hereinafter referred to.) "As to those recently interred, the necessity, with a view to public health and comfort, of removing them is as apparent as the prohibition of future interments. With those which have become entirely decomposed, leaving only the bones, that necessity may not be so urgent, but of that the legislature are the exclusive judges." (This last statement is erroneous under the decisions of this Court.)

The above quotations contain all that is said in the Kincaid Case, as to the reasons justifying the prohibition of future burials in cities or towns. It will be noted that the Court gives no basis for the right to

prohibit such burials other than that it is an ancient custom, and the necessity must be apparent to every one. As shown in the preceding pages the necessity is not apparent to men of science. It may be that burials in the Roman marshes as made prior to the commencement of the Christian era endangered the health of the inhabitants of that city. It is also possible that burials can now be made even in that unhealthy city which are free from such danger. Is the Court to close its eyes to the advance of science and knowledge in this matter of burials and be controlled by a law enacted in the year 449 B. C.? Can it be that the right of complainant to continue burials in the year 1901, in the sandy soil washed up by the Pacific Ocean, is to be denied because more than nineteen centuries ago the lawmakers of Rome thought it was wise to prohibit burials in the marshy ground of that city? Does the fact that the courts of the different States in this country have seemed to follow the edict of the Roman law, without investigation or question, preclude this Court from investigating the scientific facts now for the first time presented?

A brief review of the other cases cited in support of the decision of the California Court in the case at bar is added for the purpose of showing that the position now urged was not considered in any of them.

People vs. *Pratt*, 129 N. Y. 68.

The statute under which the Oak Hill Cemetery Association was incorporated provided for exemption of its lands from taxation. An ordinance was passed prohibiting further burials in said cemetery. The sole

question presented for decision was whether the lands of the cemetery association remained exempt from taxation after their use for burial purposes had been prohibited. In deciding this question the Court holds that the ordinance prohibiting further burials was a valid exercise of the police power; but gives no reason for such ruling other than the citation of cases hereinafter referred to.

Brick Presbyterian Church vs. *Mayor etc.*, 5 Cow. 538.

This was an action for breach of a covenant of quiet enjoyment. The premises were conveyed to the church by the city on February 25, 1766, with a covenant that they might be used for a church or a cemetery. On October 27, 1823, the city, under legislative authority, passed a by-law prohibiting further burials in that portion of the City of New York in which said cemetery was situated. No question was raised as to the validity of this by-law or ordinance. The Court say (p. 540): "The validity of the by-law is asserted by both parties. We are relieved therefore from any inquiry on that point." It was held that the covenant was made by the city in its capacity of a private owner and did not affect its legislative right to prohibit burials.

Coates vs. *Mayor etc.*, 7 Cow. 584.

This was an action in debt to recover a penalty for violation of the same by-law (ordinance) involved in the case last cited. Several similar cases were decided together involving different cemeteries in New York.

The by-law was passed under an act of the legislature conferring power on the city "for regulating, or if they find it necessary, preventing the interment of the dead within the said city." The Court say (p. 605):

> "These laws are usually enacted with a view to evils already existing. Till the state of things is such as to render the act complained of a nuisance upon actual experiment, no law is passed. Every right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others. Though, at the time it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws, or other regular remedies, for the suppression of nuisances."

It is thus assumed that the ordinance should not be passed until the cemetery has become a nuisance.

Sohier vs. *Trinity Church*, 109 Mass. 1.

This was a bill to restrain officers of the defendant church from selling its building and land and re-investing in a new site and church, in accordance with a special act of the legislature, passed for that purpose. Held that the church was not prevented from making the desired change by conditions in the deed by which title was acquired. It was further contended that defendants were bound to preserve certain tombs under the church and had no right to remove or disturb them. The fourth section of the act declared that the bodies interred in tombs had become danger-

ous to public health. Upon the authority of the cases above discussed, it is held that the removal of such tombs was a proper exercise of the police power for the protection of health, but the danger to health seems to be assumed from the recital in the statutes.

City Council vs. *Wentworth St. Baptist Church*, 4 Strobbant's Law Rep. (S. C.) 306.

This case was an action to recover a penalty imposed upon any person that might open a new burying ground in the City of Charleston. In discussing the validity of the ordinance prohibiting further cemeteries the Court refers to the ancient burial customs of Egypt, Greece and Rome and the law of the twelve tables and then says (p. 309):

> "In what can the welfare and the convenience of the corporators be more concerned than in this? May not the City Council regulate the time of burial so that it shall not be done at unseasonable hours of the night? May it not protect the health of citizens against the noxious effluvia of decomposition, by ordering the manner of interment? And most of all, may it not enforce a becoming reverence for the dead, and maintain and cherish that sentiment among the citizens which familiarity and neglect have so great tendency to impair, by prohibiting interments in private gardens, and yards and bye-places of the city; and shall the City Council be restrained in the exercise of this power so necessary to the public welfare, and so salutary in its moral influence, by a private interest?"

It will be noted that the protection against the alleged noxious effluvia of decomposition is assumed to

be necessary because it has been so regarded from ancient times, and even this protection is to be obtained by regulating the *manner of interments.*

Scientific progress is recognized by courts in other phases of life. Why not in this?

Humphrey vs. *Front St. Methodist Church,* 109 N. C. 132.

This was an action for damages for removing the remains of plaintiff's ancestor from an abandoned cemetery without the consent of plaintiff. The removal was made under the authority of a city ordinance passed for that purpose. It is held the power to pass such an ordinance "is an inherent power in the State, and is very generally exercised with the growth of towns, by forbidding further interments within the city limits after a given date"; otherwise a burial-ground which, in the infancy of a town, may be outside the limits, might continue a place of interment, *to the nuisance of the city,* after the cemetery has become the central point of population, and surrounded on all sides by dwellings and places of business."

This is based upon the danger of the cemetery becoming a nuisance, and is said with reference to an abandoned burial ground. It may be admitted that cemeteries may become so abandoned and uncared for as to become nuisances in law. The Supreme Court of California has held, however, that cemeteries are not nuisances *per se,* and also that the business of conducting a cemetery is not "an avocation presumably having an injurious tendency." (124 Cal. 347.) If, then, an injurious tendency exists, it must be by reason

of the location or conduct of the particular cemetery.

The questions in the case at bar are: Can cemeteries be so conducted and cared for as not only to prevent the creation of a nuisance, but also to avoid all danger to health? Does the Court know that they cannot?

It appears therefore that while the cases cited have held that the prohibition of further burials in cities is a proper exercise of the police power, the rulings have been based on the *assumption* that such burials are a menace to the health of such cities, rather than upon a *finding* of any danger therein.

It is respectfully submitted that the question is still an open one before this Court, and that it is incumbent on the Court to determine in this case whether or not the supposed danger arising from urban cemeteries is sufficiently established either by law or science to warrant a Court in taking judicial notice, contrary to the admissions of the pleadings, of the fact that such danger exists, and if it does, of the further fact that the danger cannot be avoided by sanitary regulations, rather than by entire prohibition of burials.

CONCLUSION.

Plaintiff in error respectfully submits that the authorities hereinabove cited compel the conclusion that the ordinance of the Board of Supervisors of the City and County of San Francisco, which is here attacked, is an unreasonable and unwarranted attempt of the exercise of the police power, and that it is therefore void;

and for that reason the judgment of the Supreme Court of California, to which this writ of error is addressed, should be reversed.

Respectfully submitted.

THOMAS E. HAVEN,

Counsel for Laurel Hill Cemetery (an association), Plaintiff in Error.

APPENDIX.

ARE CEMETERIES UNHEALTHY?

By M. G. ROBINET.

Article in the Popular Science Monthly for September, 1881.

(Vol. 19, p. 657.)

If the tomb is characteristic of humanity, as Vico has said, the cemetery, M. Pierre Lafitte remarks, is absolutely necessary to all human society. It not only furnishes a more or less hygienic method of disposing of the bodies of those who are no more—it is also a fundamental institution, in the sense that it is a symbol in no way arbitrary of human continuity. The cemetery ought, therefore, in every city to be preserved and improved, as something indispensable to the intellectual and moral improvement of the people. It constitutes an interest of the first order, the care of which justifies all necessary efforts and expenditures. With a large part of the public, however, hygienic considerations far outweigh all the moral and social advantages to be derived from the maintenance of cemeteries; and, in justice to the views of this class, it is proper to inquire to what extent the existence of cemeteries, in or near a city like Paris, can be dangerous to the public health.

The injurious effects attributable to cemeteries can

be exhibited only through the air, the soil, and the waters. Let us examine each of the three cases.

The air may be contaminated by the disengagement of poisonous gases, or by the propagation of miasms.

The decomposition of bodies in the earth is a real organic combination; its products are quite well known. The principal and most abundant of them is carbonic acid, a substance that is generated by the slow combustion of the carbon contained in all organic matter, vegetable or animal, whether it be a blade of grass, a leaf, wood, manure, or a dead body. It may be disengaged from the soil in cemeteries, and most hygienists have till now considered it one of the principal causes of their insalubrity. This is a mistake. We have on a recent special occasion made an approximate calculation of the maximum quantity of carbonic acid that can be produced in the cemeteries of Paris. The results of these calculations, which are based upon numerous weighings of corpses made in several hospitals and on the most authentic data of the chemical composition of the human body, show that this quantity is infinitely less considerable than has been supposed. The total weight of the bodies consigned each year to the cemeteries in Paris is 1,389,000 kilogrammes (3,472,500 pounds). If all their carbon were transformed (which is not the case) and disengaged as carbonic acid gas, they would furnish 1,257,000 kilogrammes (3,142,500 pounds) of that gas in five years. Now, according to the calculations of M. Boussingault, we may estimate the quantity of carbonic acid produced in Paris by the respiration of men and animals and the different processes of com-

bustion, at 18,000,000 kilogrammes (or 45,000,000 pounds) in twenty-four hours. The combustion of illuminating gas alone in Paris (218,813,875 cubic metres) produced last year a quantity of carbonic acid thirty-five hundred times more considerable than all the dead buried in the cemeteries during five years could give at the maximum rate of exhalation. The Grand Opera-House alone gives out every year thirteen times more carbonic acid from its gaslights than could be disengaged from all the cemeteries put together, even if all their carbon were converted into gas.

After examining these figures, and comparing them with the very precise experiments recently made by M. M. Jules Reiset, Muntz and Aubin, on the proportion of carbonic acid in the atmosphere, which go to show that the proportion of this gas in the air of Paris is no more considerable than in the country, we have a right to affirm that positively no danger to the public health exists from this source.

The truth is, that most of the accidents which have happened in burial places must be attributed only to confined carbonic acid. These accidents are, moreover, much less numerous than supposed. Different authors do not report more than twelve of fifteen cases, and the theory that cemeteries are centers of infection has been built upon this small basis. Such accidents have been attributed to "pestilential emanations, to certain subtile and deleterious gases, to unhealthy miasms," etc. In reality the accidents noted have been caused by the carbonic acid which has settled in the pits or vaults by virtue of its superior gravity. The same happens much more frequently than in

cemeteries, in lime-kilns, marl-pits, some cellars, fermenting vats, everywhere, in short, that carbonic acid is liable to accumulate within a limited space.

The absence of any facts relative to other gases than carbonic acid that might be disengaged in the course of cadaverous decomposition ought to have made those who are so sure of the dangerous character of cemeteries more circumspect; notwithstanding there are no such facts, these persons, besides magnifying the dangerous consequence of the liberation of carbonic acid, speak also of the no less fearful dangers which result from the generation of "certain gases and of certain volatile products." Only two gases have been found to be present to an appreciable extent in the confined air of mortuary vaults, or in the atmosphere immediately surrounding a body in decomposition—as, for instance within the enclosure of a leaden coffin. These two gases are poisonous when breathed in a certain quantity; they are ammonia and sulphohydrate of ammonia. The most delicate reagents disclose no trace of these gases in the free air, nor even in the atmosphere of the cemeteries of Paris, although such tests often, when applied in the same manner, indicate their presence in water-closets, sinks, cellars, and sewers. In the absence of ammonia and sulphuretted hydrogen, we might (though no one has yet done so) imagine the presence of the ptomaines, those alkaloids of dead bodies recently discovered by Professor Selmi. We anticipate this accusation, by observing that the presence of ptomaines in the open air has never been detected. It has been proved that they are not always poisonous; and they exist only in inconsiderable quan-

tities. So far as is known, the ptomaines may be simply resultants of the transformation of other principles during extraction, for "they sometimes exhale a perfume like that of certain flowers, as the orange or wild-rose, and of certain aromas"—odors which it is well known are not found among those of cadaverous putrefaction. Moreover, these alkaloids, according to Selmi, are readily decomposed in contact with the air. The ptomaines, then, can not enter into account in establishing a noxious character for cemeteries.

Assuredly there are miasms. We do not mean by this term those famous entities by which populations have been struck with terror but those infinitely small, inferior organisms, the microbes, whose existence can not be disputed after the brilliant investigations of contemporary micrographs, especially those of M. Pasteur. We have no disposition to ignore the existence of four or five species of microbes, the destructive effects of which appear to be well established, such as the antrax-bacteria, the septic vibrion, Obermeyer's spirill, the micrococcus of the hen-cholera, and some other less well-known bacteria. But, without denying that the air may convey infectious germs, and that these may penetrate into the human organism through various channels of absorption, facts which have become almost classical, we still have to examine whether cemeteries, more than other places, give rise to these miasms, these legions of microbes, whose presence in considerable numbers in certain places, notably in hospital-wards, is incontestable.

A number of well established facts go to prove that the different germs are destroyed by the combustion of

corpses in the earth as soon as putrid fermentation begins. We cite the characteristic fact of the disappearance of the carbuncular virus in the bodies of animals that have died of the plague-sore, from the moment the body begins to putrefy (Pasteur, Collin), a fact which is practically recognized by all horse-killers, who are aware that infected subjects shortly after death cease to be dangerous to them. A more important fact is that the very exact micrographic researches undertaken by M. Miquel in the cemeteries of Paris have certainly shown that there do not exist in them any centers specially productive of germs of cryptogams. This learned physician has ascertained, contrary to the opinion of many authors, that the vapor of water which arises from the soil, from rivers, and from masses in active putrefaction, is always micrographically pure—that is, it contains no microbes; that the gases proceeding from buried matters in decomposition are always free from bacteria; that even the impure air which is caused to pass over putrefied meats, instead of being charged with microbes, becomes fully purified, on the single condition that the infectious and putrid filter is in a condition of humidity comparable to that of the ground at about a foot below the surface. Finally, none of the numerous species which M. Miquel has isolated and inoculated upon living animals has shown itself capable of determining pathological troubles worth mentioning. After this, we may with perfect security put aside those pretended miasmatic emanations, those mysterious effluvia with which certain hygienists have gratuitously frightened an inexperienced public, and

which some speculators have turned to good account for themselves.

Regarding the extent to which the soil is affected, in consequence of burials, we are in possession of exact and well-established facts. The time required for the earth fully to transform organic matter that may be buried in it varies according to the physical and chemical nature of the soil; in some grounds bodies are, we might say, devoured in a few days; more commonly the time required to transform a corpse is estimated at from five years, as in Paris, to twenty years, as at Geneva, and even more in some places. Authors also differ respecting the time needed for the operation: Gmelin and Wildberg believed that it takes thirty years, while Maret thought that three years are enough.

Legislation based on this point has designated a variety of periods after which burial-grounds may be used over again. At Frankfort, thirty years is the standard; at Leipsic, fifteen years; at Milan and Stuttgart, ten years; at Munich, nine years. Generally the time necessary for a complete destruction of the body is estimated in France at five years, but this limitation is not at all absolute and in many cases burial grounds may be used anew before that time. In the majority of the experiments made by them, Orfila and Lesueur found that bodies were reduced to skeletons at the end of fourteen, fifteen, or eighteen months. After that time, the soil under the vivifying influence of oxygen resumed its original qualities.

On this point, we may assert, contrary to certain affirmations, but in accordance with experiments, the

importance and value of which, are guaranteed by the name of the author, M. Schutzenberger, that, so far as the cemeteries of Paris are concerned, no saturation of the soil, either with gases or with solids, exists. The recent experiments of this chemist have resulted, in effect, in showing that the soil in the Parisian cemeteries is still in a sufficiently favorable condition as to its composition to effect the absorption of the gases and the complete transformation of the solid and liquid matters resulting from the putrefaction of the bodies that may be buried in them. The analysis, so far as it refers to gases at least, has given identical results with the analyses of good arable lands. Moreover, there is nothing to prevent the modification of the soil of cemeteries by means of suitable applications for augmenting the intensity and rapidity of its combustible force. Such applications are certainly not beyond the means of modern agricultural chemistry.

No important instance of the contamination of waters has been established against the cemeteries. Cases of an exceptionally unfavorable influence of a mass of decomposing matter on certain waters may occasionally occur, but none such have been established in the soils of Paris, and those which have been described in other places are not conclusive. What, on the contrary, most evidently comes out after a study of the facts is the remarkable purifying power the earth possesses. It would take too long to give here the proof that water is not infected by cemeteries; we mention only the case of the well in the cemetery of

Montparnasse, the water of which is shown by chemical analysis to be of excellent quality.

With respect to the inferior organisms which some persons believe may be conveyed away by water that has traversed the soil of cemeteries, we may say that M. Pasteur has shown that the waters of springs issuing from the ground even at a slight depth, are so destitute of germs that they can not fertilize the liquids which are most susceptible of change. Such waters, says M. Pasteur, "are at the base of lands which have been traversed incessantly for centuries by streams, the effect of which has been constantly to cause the finest particles of the superposed soils to descend to the springs. The latter, in spite of these favorable conditions for polluting them, remain indefinitely of a perfect purity, a manifest proof that a certain thickness of earth arrests all the finest solid particles."

The wells in Paris being hardly ever used, they ought to be infected by the nitrates which, supposed to be introduced into them, are not drawn from them. It is, however, far from being proved that the cemeteries contribute materially to the excess of nitrates in the well-waters, for the analyses we have made show no sensible difference from those which were made by M. Boussingault twenty years ago. The mean quantity is the same, and our partial results show sometimes a little less, sometimes a little more, saltness than those of M. Boussingault. Now people have continued to bury, and the ultimate products of decomposition have become more and more soluble; and if the excess of nitrates that has been observed was due

to the cemeteries it would of necessity have increased.

Besides the precise points which we have reviewed, more general and indeterminate accusations are made against the cemeteries. Such charges are connected with the prejudice, often ill-founded, under the influence of which we *a priori* attribute injurious properties to everything that smells badly. This error arises in part from the repugnant associations which are commonly attached to the substances and places from which bad smells emanate; but, while we admit that effluvia which offend the sense of smell are not agreeable, it is not true that such emanations are generally injurious to the public health.

The facts of this order, which have long served as the foundation of the accusations directed in the name of hygiene against the cemeteries, date from the last century, when chemistry and hygiene were still in the rough. No modern observation enforces them. On the contrary, contemporary scientists, who have studied the effects of animal putrefaction, are almost unanimous in regarding it as innocuous. Such is the opinion of the most authoritative modern authors, Dr. Warens, Bancroft, Andral, Parent-Duchatelet, and, more especially with reference to cemeteries, Professors Depaul and Bouchardat.

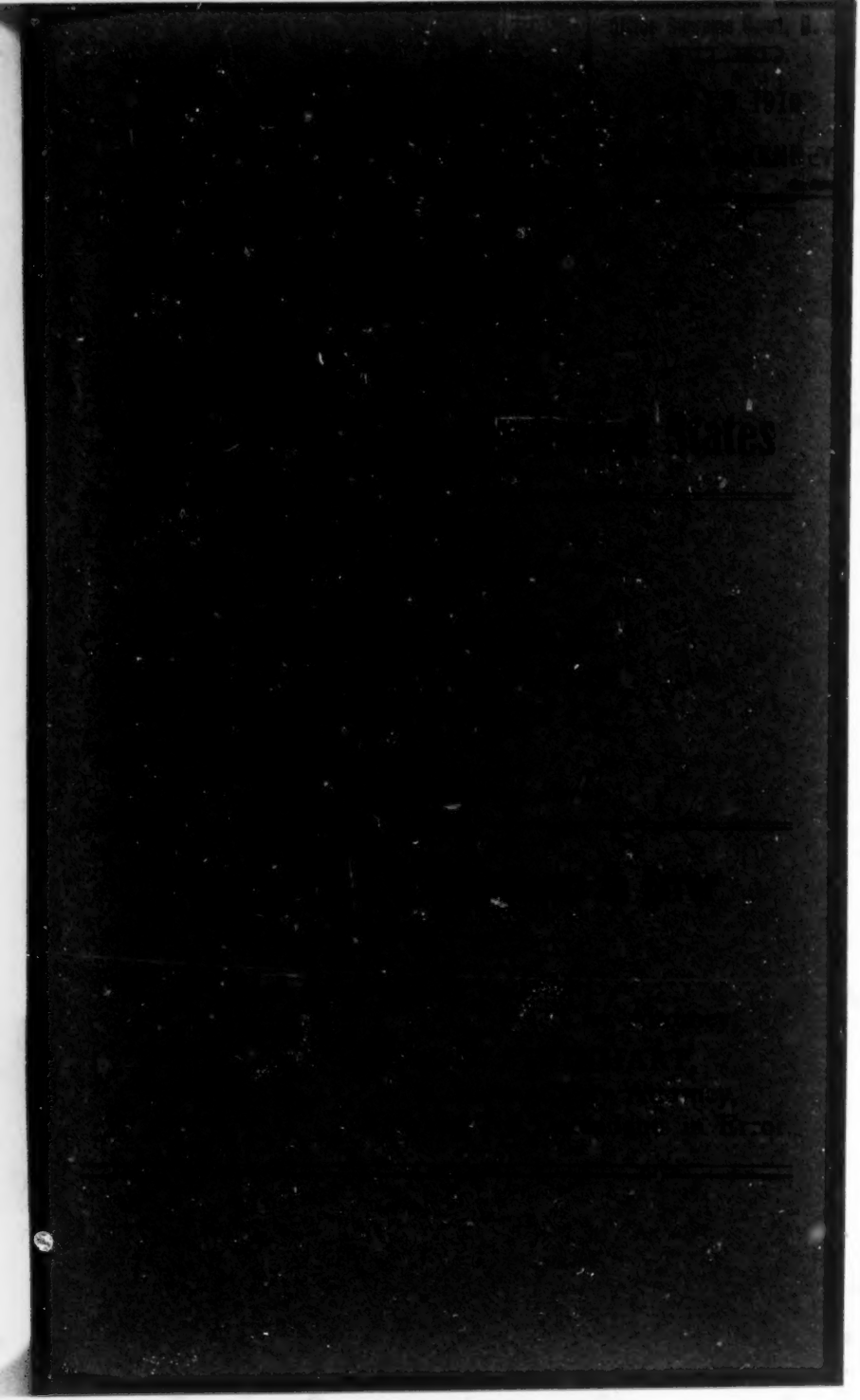
It is hardly necessary to mention that a number of occupations expose those engaged in them to putrid exhalations, without producing injurious results upon them. Thus, soap-boilers and chandlers are known to enjoy excellent health, and not to be subject to fevers or epidemic affections, notwithstanding they often use fat in a very advanced stage of putrefaction (Tar-

dieu). Tanners and curriers are neither more frequently nor more seriously ill than other men, aside from the occasional carbuncular affections they may acquire by real and direct inoculation, although they are often obliged, especially in summer, to work upon hides that are green with putrefaction. The same may be said of scavengers. The gases which, confined in pits, cause asphyxia, bring no diseases upon the men when a sufficient quantity of atmospheric air is present with them. Examples illustrating this principle are not wanting. A long catalogue of them might be cited without any trouble, except to the reader, to whom the reiteration would be tedious.

In conclusion, it may be affirmed that, to the present day, not a single instance of positive noxious infection has been laid to the charge of the cemeteries of Paris. We are in a situation, therefore, to reassure the public on this point, and to deplore with the illustrious Fourcroy "the abuses which certain persons have made of the discoveries in physics and chemistry, taking advantage of them to magnify and multiply complaints against the air of cemeteries and against its effects on the neighboring residences."

Let us say, if we have not courage to support it, that the spectacle of death ought to be hidden from our sight, that in our life of feverish industrialism we have no time to spare for the dead; let us even acknowledge that we have speculative reasons for desiring to remove the burial-grounds from Paris; but let us stop invoking hygiene; let us stop asserting that cemeteries are real centers of infection, that they are susceptible of developing the germs of the gravest

maladies; let us stop frightening the ignorant public with sonorous words and phrases. It is easy enough to say and repeat that cemeteries are a source of dangerous emanations, but assertions are not proofs.—*Revue Scientifique.*



STATEMENT OF POINTS AND AUTHORITIES.

Page

October Term, 1909.

No. 100.

IN THE

Supreme Court of the United States

LAUREL HILL CEMETERY,
Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

An examination of any case involving the question of the constitutionality of a municipal ordinance necessarily involves the elimination of all unnecessary questions. In this case various errors in the judgment of the Supreme Court of the State of California are relied on by plaintiff. But upon an examination of the errors alleged we are convinced that there is in reality but one question involved in the case. Will the Court declare the ordinance unconstitutional because of the

fact that it operates as a deprivation of property without due process of law?

First, The rule is that the Court will not consider the question whether the passage of this ordinance was within the powers conferred upon the City and County of San Francisco by its charter and under the Constitution of the State.

The ordinance in question has twice been before the Supreme Court of the State of California for consideration. The Supreme Court of the State passed upon the validity of this ordinance in the case of *Laurel Hill Cemetery* vs. *City and County*, 152 Cal. 464, and in the case of *Odd Fellows' Association* vs. *City and County of San Francisco*, 140 Cal. 226.

In each case the Court upheld the validity of the act and in each case held that the passage of the act was within the powers conferred upon the municipality of San Francisco. The writ of error in this case is the result of the decision in the Laurel Hill case just cited, and in considering the ruling of the Court in that case, this Court will, in accordance with its established rule, consider only the Federal question involved in that ruling; the Court will hold itself precluded from considering the question, whether or not the ordinance is a proper ordinance under the laws or the Constitution of the State of California.

> "But the same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national courts, will

also hold the national courts bound to respect the decisions of the state courts, upon all questions arising under state constitutions and laws, where nothing is involved of national authority or of right under the constitution, law or treaties of the United States, and to accept the state decisions as correct and to follow them whenever the same questions arise in the national courts."

Cooley, Constitutional Limitations, 7th ed., p. 31.

"The Constitution of California vests in the municipality of the City and County of San Francisco the right to make 'all such local police, sanitary and other regulations as are not in conflict with general laws.' The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested and is in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it."

Crowley vs. *Christensen*, 137 U. S. 86, at p. 92, 34 L. Ed. 620, at p. 624.

Also,

Smiley vs. *Kansas*, 196 U. S. 447, 49 L. Ed. 546, at 550.

Second, the only constitutional question involved in this case is whether or not the ordinance in this case is violative of the Fourteenth Amendment of the Con-

stitution of the United States, in that it deprives persons of property without due process of law.

The only rights involved in this case are property rights. The sole complaint the plaintiff can have against this ordinance is that its enforcement will deprive said plaintiff of its property without due process of law. No individual is complaining because of the fact that he or she is being deprived of the right of burial, or the right to bury any one in the City and County of San Francisco. As a matter of fact, no one has an inherent right of burial in the City and County of San Francisco. It is an actual fact that burials are now made immediately outside of the city limits.

As was said in the case of *Austin* vs. *Austin City Cemetery*, 87 Tex. 330, at p. 338:

> "Nor can we see that there are not convenient localities outside of the city limits which may be made available for cemetery purposes."

One of the grounds upon which the plaintiff in its complaint attacks the ordinance in question is that the ordinance is violative of the provisions of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligations of a contract entered into by and between the plaintiff and the State of California. The contract referred to is, of course, the charter of the plaintiff corporation. The plaintiff, in addition to this charter, cites facts attempting to show an estoppel as against the City and County.

However, we are convinced that the Court will not

consider this constitutional question. We are convinced that the only point to be considered by this Court is, as we have already said, that of the deprivation of property. The ordinance in question is an ordinance passed under the police powers of the City and County. A charter such as plaintiff's charter is, however, at all times subject to the police power. In reality, one of the implied terms of the charter is that it *is* subject to the exercise of such power. Possibly the principle here contended for is more correctly stated in the following manner: Section 10 of Article 1 is designed to prevent the impairment of a contract. It protects the contract and only the contract. The contract in this case is a contract permitting the organization of an association for cemetery purposes. It is not a contract whereby the State agrees neither directly or by delegation of power to a municipality, not to prohibit burials when such prohibition is deemed wise.

> "It is now too late to contend that any contract which a state actually enters into when granting a charter to a private corporation, is not within the protection of the clause in the Constitution of the United States that prohibits states from passing laws impairing the obligations of contracts. * * * In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently the first inquiry in this class of cases

always is whether a contract has, in fact, been entered into, and if so, what its obligations are."

Stone vs. *Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

Also,

Coates vs. *Mayor*, 7 Cowen, 584;
Boston Beer Co. vs. *Mass.*, 97 U. S. 25, 24 L. Ed. 989;
Mugler vs. *Kansas*, 123 U. S. 623, 31 L. Ed. 205.

We believe that we have now substantiated the statement heretofore made by us, to wit: that the only question before the Court is: Will the Court declare the ordinance unconstitutional because of the fact that it operates as a deprivation of property without due process of law.

There is, however, another matter which, in our process of elimination, we desire to consider. The plaintiff in this case has alleged "that there are within the corporate limits of the City and County of San Francisco several large tracts of land, some of which consist of sandhills, and are entirely unoccupied, and some of which are used solely for farm purposes. That some of said tracts of land contain several hundred acres of land, and interments of dead bodies could be made on said tracts of land and within the corporate limits of the City and County of San Francisco, which would be more than a mile distant from any

human habitation or public thoroughfare." (P. 26, Transcript.)

An examination of these allegations, of course, immediately reveals the fact that there is nothing therein showing that these large tracts of land are suited for cemetery purposes, or that the owners thereof desire or are willing to use them for burial purposes. The paragraph does contain the allegation that some of these tracts of land contain over 100 acres, but it is impossible to say from a reading of the paragraph whether these tracts are the tracts that are unoccupied, or are the tracts that are used for agricultural purposes.

Furthermore, it is quite consistent with the facts of this paragraph, that the tracts of land are in the neighborhood of car lines, that they are in the neighborhood of dairies or other places where animals are kept, or that they are contiguous to sources of water supply.

As a matter of fact, however, we believe that one of the matters to be eliminated in this case is the consideration of these tracts of land.

The plaintiff alleges in its complaint that "since the establishment of said cemetery many residences have been built in its neighborhood, and the same have been and now are occupied with families." (P. 25, Transcript.) In addition to this, plaintiff alleges in paragraph IX that no public streets have ever been opened or extended through the cemetery, but that all

of the streets of said City and County abutting upon said tracts of land have been and are shown to end thereat. The cemetery of the plaintiff, in other words, is not situated within "a large tract of land in which interments of dead bodies would be more than a mile distant from any human habitation or public thoroughfare." On the other hand, it is a cemetery in the midst of human habitations and public thoroughfares.

As a matter of fact, as far as appears from the complaint, there are no cemeteries in San Francisco differently situated than the cemetery of plaintiff.

The uniform rule is that the Court will not, however, at the request of a plaintiff owning a cemetery in the midst of human habitations, declare a law invalid because it prohibits burials in cemeteries removed from human habitations. To state the proposition somewhat differently, if, under the police power, it is proper for the legislative body to prohibit burials in the neighborhood of human habitations, then plaintiff, being the owner of a cemetery in the neighborhood of human habitations, can not complain of an ordinance because it prevents burials in cemeteries or upon tracts of land removed from human habitations.

> "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional pro-

tection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. *Albany County* v. *Stanley*, 105 U. S. 305, 311, 26 L. Ed. 1044, 1049; *Clark* v. *Kas. Cy.*, 176 U. S. 114, 118, 44 L. Ed. 392, 396, 20 Sup. Ct. Rep. 284; *Lampasas* v. *Bell*, 180 U. S. 276, 283, 284, 45 L. Ed. 527, 530, 531, 21 Sup. Ct. Rep. 368; *Cronin* v. *Adams*, 192 U. S. 108, 114, 48 L. Ed. 365, 368, 24 Sup. Ct. Rep. 210. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails. With regard to taxes, especially, perhaps it might be assumed that the legislature meant them to be valid to whatever extent they could be sustained, or some other peculiar principle might be applied. See, e. g., *People's National Bank* v. *Marye*, 191 U. S. 272, 283, 48 L. Ed. 180, 186, 24 Sup. Ct. Rep. 68."

People ex rel. Hatch vs. *Reardon*, 204 U. S. 152, 51 L. Ed. 415, at p. 422.

"In a case from a state court, this court does not listen to objections of those who do not come within the class whose constitutional rights are alleged to be invaded; or hold a law unconstitutional because, as against the class making no complaint, the law might be so upheld. This was distinctly ruled in a case decided at this term."

Iroquois Transportation Co. vs. *Delaney Forge and I Co.*, 205 U. S. 354, 51 L. Ed. 837 at 840.

In the *City of Lampasas* vs. *James Bell*, 45 L. Ed. 527, at p. 530, 180 U. S. 276, the City of Lampasas sought to evade payment of its bonds by claiming that the city had not been properly incorporated. The claim of improper incorporation was based upon the unconstitutionality of the act under which the incorporation had taken place. It was claimed that the act deprived people who had been annexed or included as a part of the city of Lampasas, of their rights without due process of law. The Court said (at p. 530):

> "But what concern is it of the plaintiff in error whether the residents of such territory were or were not given an opportunity to be heard? It had no proprietary right or interest in 'territory proposed to be incorporated'; it was put to no hazard of taxation without a hearing; nor can it stand in judgment for those who had such interest or were put to such hazard. It was certainly the right of the residents of the territory to submit to incorporation and accept its burdens and its benefits."

In the case of *Smiley* vs. *City of Kansas*, 196 U. S. 447, 49 L. Ed. 546, the following were the facts and holding:

Smiley had been convicted of a violation of the anti-trust law in Kansas. The case came before the

Supreme Court of the United States upon a writ of error from the court of Kansas. The Court, after finding that a prohibition of the specific contract made by Smiley could properly be made under the police power of the state, said:

> "That is as far as we need go in sustaining the judgment in this case. That is as far as the Supreme Court of the State went."
>
> * * * * *
>
> "As said by the Supreme Court of the state concerning the defendant's criticism of the breadth of this statute, 'He can not be heard to object to the statute merely because it operates oppressively to others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism of the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamentally and decisively settled." (P. 551.)
>
> "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it. On this ground it has been held that the objection that a legislative act was unconstitutional because divesting the rights

of remaindermen against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remaindermen themselves. And a party who has assented to his property being taken under a statute, can not afterwards object that the statute is in violation of a provision in the Constitution designed for the protection of private property. The statute is assumed to be valid, until some one complains whose rights it invades. *Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the Legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not void but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose." Cooley, Const. Limit., 7th ed., p. 232.

As a matter of fact, the persons owning the large tracts of land described in the complaint as being more that one mile removed from human habitations, may

never desire to use said lands for cemetery purposes. They may, in fact, prefer, for reasons of their own, to treat the law as constitutional and waive any right of objection they may have to it.

> "There are cases where a law in its application to a particular case must be sustained because the party who makes objection has, by prior action, precluded himself from being heard against it. *U. S.* vs. *Gale*, 109 U. S. 65; *People* vs. *Bunker*, 70 Cal. 212. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will." Cooley, Constitutional Limitations, 7th ed., pp. 250-251.

For further authorities as to the point that plaintiff can not complain because of the operation of the law upon a class to which he does not belong, see: *Brown et al.* vs. *Ohio Valley R. R.*, 79 Fed. Rep. 176; *Clark* vs. *City of Kansas City*, 176 U. S. 114, 44 L. Ed. 392; *Pittsburg C. C. & S. T. L. R. R.* vs. *Montgomery*, 39 N. E. 582; *Austin* vs. *Board of Aldermen of the City of Boston*, 74 U. S. 694, 19 L. Ed. 224; *Supervisor* vs. *Stanley*, 105 U. S. 305, 26 L. Ed. 1044.

An additional reason why this Court need not consider the allegations in the complaint concerning these large tracts of land is given by the Supreme Court of

the State of California in the decision from which appeal is now being taken:

> "At the time this ordinance was adopted and for many years theretofore, the Penal Code of this state contained a provision (sec. 297) making it a misdemeanor to bury or inter, or cause to be buried, any human remains in any place within the corporate limits of any city or town in this state, or within the corporate limits of the city and county of San Francisco, 'except in a cemetery or place of burial now existing under the laws of this state and in which interments have been made, or that is now or may hereafter be established or organized by the board of supervisors of the county or city and county in which such city or town or city and county is situate.' By reason of the existence of this statute it was already, at the time of the passage of the ordinance in question, a misdemeanor to inter any dead body in any place within the city and county of San Francisco outside of the existing cemeteries, or those to be authorized by the supervisors. There is no suggestion that the establishment of new cemeteries was contemplated. The ordinance, therefore, in effect merely prohibited the interment of bodies in existing cemeteries. It is not alleged that any such cemeteries did in fact exist upon any of the vacant tracts of land referred to in the complaint. Indeed, the only cemetery described by the plaintiff is its own, and that, as is shown by the allegations of the complaint itself, is situated in the midst of a thickly settled district. As is alleged, 'Many residences

have been built in its neighborhood, and the same have been and are now occupied with families.' As no presumptions are to be indulged in support of the pleading, it may be assumed that all the cemeteries existing in San Francisco at the date of the passage of the ordinance were similarly situated. The effect of the prohibition, therefore, was merely to prevent further interments in cemeteries situated within densely populated portions of the municipality. That such prohibition is a reasonable exercise of the police power vested in the board of supervisors clearly appears from the authorities above cited."

Laurel Hill Cemetery vs. *City and County*, 152 Cal. 464, at p. 473, 474.

Will the Court declare the ordinance in this case unconstitutional because it deprives persons owning property in the midst of human habitations of their rights in said property by prohibiting burials therein?

"In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police powers of the state or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, * * *?"

(In our case, of course, the words "personal liberty" should be omitted and the words "uses of his property" substituted.)

"This is not a question of substituting the judgment of the court for that of the Legislature. If the act be within the power of the state, it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court."

Lochner vs. *New York*, 198 U. S. 45, 49 L. Ed. 937, at p. 941.

In order to decide whether or not this ordinance is a proper exercise of the police power, we shall consider, first, What are the limits of the police power? second, What are the rules by which this Court decides whether or not the ordinance is a proper use of the police power? third, Applying these rules to the matter in question, we believe that we will conclusively demonstrate the validity of the ordinance in question.

First: What are the limits of the police power?

"We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

Chicago, Burlington & Quincy R. R. vs. *Ill.*, 200 U. S. 561, at p. 592, 50 L. Ed. 596, at p. 609.

"But the states have full power to regulate within their limits, matters of internal police, in-

cluding in that general designation, whatever will promote the peace, comfort, convenience, and prosperity of their people."

Escanaba & Lake Michigan Transportation Co. vs. *City of Chicago*, 107 U. S. 678, 27 L. Ed. 442, at p. 445.

"The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety and welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the states, except so far as falling within the scope of a power confided to the general government."

Leisy vs. *Hardin*, 135 U. S. 100, 34 L. Ed. 128, at p. 132.

The police power includes, then, that general and indefinite extent of power vested in the state for the purpose of protecting, preserving and promoting public health, safety, morals, welfare, prosperity and convenience. It is that indefinite power inherently residing in the government, and placed there so that the government may fulfil the purposes for which it was formed, to wit, the protection and promotion of the health, comfort, safety, welfare and prosperity of its citizens.

Second: What are the rules by which the Court

determines whether or not an ordinance comes within the police powers?

1st. The rule is that the Court, in passing upon an ordinance, will resolve every doubt in favor of the ordinance.

> "Though reasonable doubts may exist as to the power of the Legislature to pass a law, as to whether a law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of the Government."
>
> *Holden* vs. *Hardy*, 169 U. S. 366, 42 L. Ed. 780, at p. 792.

This rule, of course, is even stronger in the case of a Federal Court reviewing a decision of a state court upholding an ordinance within said state.

> "In passing upon questions of this character, as to the validity and reasonableness of a discrimination or classification in relation to limitations as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the state where the law is to become operative, —whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare—are all matters which the state court is familiar with; but a like familiarity can not be ascribed to this court, as-

suming judicial notice may be taken of what is or ought to be generally known. For such reason, this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the court of a state whose people are to be affected by the operation of the law. The highest court of the state in which statutes of this kind under consideration are passed are more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject matter of the legislation, than this court can possibly be."

Welch vs. *Swasey*, 214 U. S. 91, 53 L. Ed. 923, at p. 929.

2d. The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.

Holden vs. *Hardy*, *supra*, at p. 793.

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulation shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the

property and personal rights of the citizen are unnecessarily, and in a manner wholly and arbitrarily, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass and they form no subject for Federal interference."

Gundlin vs. *City of Chicago*, 177 U. S. 183, 44 L. Ed. 725, at p. 728.

"The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances, of the privileges of pursuing an ordinary calling or trade, and of acquiring, holding, or selling property, is an essential part of his rights of liberty and property, as guaranteed by the 14th amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it can not adjudge that the defendant's right of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. *Mugler* vs. *Kansas*, 123 U. S. 623, 661."

Powell vs. *Penn.*, 127 U. S. 678, 32 L. Ed. 253, at p. 256.

3d. In other words, where there is a question as to whether or not the matter before the Court is prop-

erly a matter within the police power of the legislature, the judgment of the legislature is conclusive. Thus, in the case of *North Chicago City R. R.* vs. *Lakeview*, 105 Ill. 207, at page 212, the Court had under consideration an ordinance prohibiting the use of steam as a motive power for propelling cars over and along one of the public streets of the town. The Court, in discussing this matter, said:

> "We do not at all question the general proposition which has been argued with much elaboration by appellant's counsel, that under a general grant of power over nuisances like the one in question, town authorities have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. The adoption of such an ordinance would not be a legitimate exercise of the power granted, but on the contrary, would be an abuse of it. But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions under a general delegation of power like the one we are considering. Their action under such circumstances would be conclusive of the question.
>
> "But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress, yet when that power, or some other exclusive power of the Federal Government, is not in question, the police power of the State extends to almost every thing within

its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse racing or anything else that the legislature may deem opposed to the public welfare." *Crutcher* vs. *Commonwealth of Kentucky*, 141 U. S. 47, 35 L. Ed. 649, at p. 653.

Also, see quotation from

Powell vs. *Pennsylvania, infra.*

4th. The Court should not declare the act unconstitutional because a statute ordains a complete prohibition of the act or thing legislated against instead of a regulation thereof. In other words, the Court will not decide that because, to the mind of the Court, it would be wiser or more equitable merely to regulate rather than to prohibit, therefore the act is unconstitutional. The Court will apply the same standard to this as to any other question of police power before it. Is the ordinance so arbitrary in its scope that the Court can say that there is no real relation between the object sought and the legislation itself? Will the Court say that the reasons for the prohibition are so fantastic that though enacted under the guise of police power, the ordinance is a mere excuse to deprive persons of their rights or property? In the case of *Powell* vs. *Commissioners of Penn.*, 127 U. S. 678, 32 L. Ed. 253, the

Court had under consideration the validity of a law prohibiting the sale of oleaginous substitutes for butter. The act under discussion was passed by the legislature in the interest of and for the protection of public health and the Court so considered it. At the trial of the case plaintiff offered to prove that the oleomargarine sold by plaintiff (for the sale of which under statute he had been arrested) was pure, wholesome and harmless. The evidence was rejected. The United States Supreme Court upheld the rejection of this testimony, and in its opinion said:

> "It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court can not say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. 'Every possible presumption,' Chief Justice Waite said, speaking for the court in *Sinking Fund Cases*, 99 U. S. 718, 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government can not encroach on the domain of another without danger. The

safety of our institutions depends in no small degree on a strict observance of this salutary rule. Whether the manufacture of oleomargarine, or imitation butter of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. * * * The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession of to sell, for purposes of food, of any article manufactured out of oleaginous substance, or compounds other than those produced from unadulterated milk or cream from un-

adulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature, or to the ballot box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government." (P. 256-257.)

"As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner or extent of regulation rests at the discretion of the governing authority." *Crowley* vs. *Christensen*, 137 U. S. 86, 34 L. Ed. 620, at p. 624.

5th. The judiciary can not declare the act unconstitutional merely because it prohibits harmless things and harmless acts as well as harmful things and harmful acts. In other words, in order to sustain an act, the judiciary need not say that everything prohibited by the act is, standing by itself, properly prohibited. Take, for example, the matter in question. The complaint avers "that at no time since the establishment of said cemetery (plaintiff's cemetery) has it, or any part thereof been, nor is it or any part, nor will it or any part thereof, become injurious to health, indecent or offensive to the senses, or an obstruction to the free

use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of any public park, square, street or highway. That the soil of said cemetery is sand, and the natural condition and character thereof is such that no dangerous or disease-breeding elements can be transmitted through the same from the decaying remains of bodies buried therein. That since the establishment of said cemetery, many residences have been built in its neighborhood and the same have been and are now occupied with families, and yet it has not been proven that the district embracing said cemetery and said residences have been unhealthy or subject to epidemics, but on the contrary, said district has always been and is now regarded as particularly healthy and free from the diseases which prevail in other parts of said city and county." (P. 25, Transcript.)

This paragraph, it will be noted in the first place, simply states that the cemetery has not been, and will not be a nuisance. The language in which the cemetery is described is borrowed from Section 3480 of the Civil Code of the State of California defining a public nuisance. The fact that the cemetery is not or has not been injurious to public health so as to interfere with the comfortable enjoyment of life or property, simply means that plaintiff's cemetery has not been and is not a nuisance. But a thing, to be

properly prohibited under the police power, need not be a nuisance.

Furthermore, in regard to the healthfulness of the district, it is to be noted that this paragraph merely alleges that it "has not been proven" that the cemetery is unhealthy or subject to epidemics. It does not state that, as a matter of fact, it *is* not unhealthy.

The same criticism holds in regard to the allegation that said district "has always been considered particularly healthy and free from the diseases which prevail in other parts of the city and country." This is not an allegation that the cemetery is healthy, simply that it is regarded, possibly by plaintiff only, as healthy and free only from the diseases prevailing in other parts of the town, not from diseases which, even though not prevailing in other parts of the town, may prevail in the neighborhood of the cemetery.

Of course, another matter to which attention might properly be called at this time, is the fact that in a city and county of limited extent such as San Francisco (the Court will judicially notice the fact that San Francisco is a municipality of decidedly limited area), it is perfectly proper to protect and insure its future growth, healthfulness and prosperity by preventing the setting aside of large tracts of land for cemetery purposes, when as a matter of fact the legislature feels that said tracts of land may be shortly and certainly will be eventually necessary for human habitations. It may be a fact that the said growth, in the minds of the legislature, may demand the use of such

tracts, and we think it proper for the legislature, under its general police power, to insure the prosperity and growth of the city by preventing withdrawal of lands as cemeteries. The cemetery of plaintiff, we see from the complaint, is an obstruction to the extension of streets and thoroughfares, and therefore necessarily is an obstruction to the continuous and extended growth of the city.

However, the intention of the plaintiff in this paragraph of its complaint was to show that the ordinance, in prohibiting burials in plaintiff's cemetery, prohibited harmless acts or things. Will the Court declare an ordinance unconstitutional merely because the ordinance, in its operation, may have this incidental effect? Most decidedly not.

In the case of *Booth* vs. *People of the State of Ill.*, 184 U. S. 425, 46 L. Ed. 623, at p. 626, a statute of the State of Illinois forbidding the making or dealing in options for the purchase of grain, etc., was held valid. The plaintiff in this case, however, contended that the ordinance was invalid, and in order to prove its invalidity, called the attention of the Court to the fact that it prohibited the making of many perfectly honest harmless contracts.

> "The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty, as guaranteed by the supreme law of the land. Does this conclusion follow from the prem-

ises stated? Is it true that the Legislature is without power to forbid and suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and *yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious.*

"If, looking at all the circumstances that attend, or which may *ordinarily* attend, the pursuit of a particular calling, the state thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts can not interfere unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental laws."

"We can not say from any fact judicially known to the court or from the evidence in this case, that the prohibition of options to sell grain at a future time has, in itself, no reasonable relation to the suppression of gambling grain contracts, in respect of which the parties contemplate only a settlement on the basis of differences in the contract and market prices." (P. 625.)

"The statute here involved may be unwise. But an unwise enactment is not necessarily for that reason invalid. It may be, as suggested by counsel, that the said vigorous enforcement of the statute will materially interfere with the hand-

ling or moving of vast amounts of grain in the West which are disposed of by contracts or arrangements made with the Board of Trade of Chicago. But those are for the consideration of the Illinois Legislature. The courts have nothing to do with the mere policy of legislation." (P. 627.)

"If the legislation tends to promote the health, the safety, the morals, or the order and peace of the community, the general public convenience, or tends to promote the general public welfare and prosperity of the community, the only proper judicial inquiry is whether or not such legislation has a real and substantial relation to the ends sought to be accomplished. If it has, the rights of the individual must yield to the general welfare of the community." F. M. Cobb, Harv. Law Review, vol. XXI, No. 3, p. 177. Jan., 1908.

6th. The Court will not declare an ordinance unconstitutional merely because the Court itself knows or feels that the legislative conclusion as expressed in the enactment is incorrect, when as a matter of fact, the legislative conclusion is supported by public opinion, commonly held belief, or scientific authority. When the legislative opinion has such support, the Court can scarcely call it unreasonable or capricious. The Court will not make itself the forerunner of public opinion; neither can it make itself an arbiter in scientific disputes.

The legislature of the State of Tennessee enacted

a law prohibiting the sale of cigarettes. In the case of *Austin* vs. *Tenn.*, 179 U. S. 343, 45 L. Ed. 224, at p. 228, the Court uses the following words:

> "Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the Supreme Court of Tennessee that 'they are inherently bad and bad only.' At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effect, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely. * * *"
>
> *Austin* vs. *Tennessee*, 179 U. S. 343, 45 L. Ed. 224, at p. 228.

"The fact that the belief is not universal, is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the Legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious dis-

> cases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not." *Viemeister* vs *White*, 72 N. E. 97. Cited with approval in *Jacobsen* vs. *Mass.*, 147 U. S. 11, 49 L. Ed. 643, at p. 652.

We think, then, that the Supreme Court of the State of California was undoubtedly correct when it utilized the following language in passing upon this point:

> "As was said by this court in the Odd Fellows' Cemetery case, 140 Cal. 231, 'Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health if not suppressed or regulated, the legislative body may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past. * * * The exercise of this power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court.' The question is whether in the exercise of a reasonable discretion the board may conclude that the thing prohibited is dangerous to the public health. The views already expressed make it clear that this decision may properly be reached with regard to the interment of dead bodies in thickly settled communities.

> Whether the danger to be apprehended from such interment is to be best averted by a prohibition of further burials, is a question of policy to be decided by the legislative body. The court is not to substitute its judgment for that of the board of supervisors. Any evidence that might be introduced tending to show that, as a matter of fact, a particular cemetery had not proven or might not prove detrimental to the public health, would not alter the fact, of which courts take judicial notice, that cemeteries situated as this one is, are likely to cause such injury, and are therefore, as to further use, within the control of the legislative authority." *Laurel Hill Cemetery* vs. *City and County*, 152 Cal. 464, at p. 474.

We do not mean to say that a court must declare an ordinance unconstitutional whenever the court does not find public approval for the legislative conclusion therein represented; if the regulation appears reasonable to the court, that is sufficient. But if the legislative conclusion has public approval or the approval of scientific men, or approval to which a reasonable man is justified in giving weight, then the court must sustain the legislation.

From the above considerations we see that in order to uphold an ordinance as coming within the police power, the court need not take *judicial notice or judicial cognizance* that the thing legislated against is harmful or otherwise injurious. On the other hand, in order to hold the legislation unconstitutional, the court must take judicial notice or cognizance of the

fact that the thing is not harmful and has not harmful tendencies. The court must hold that there is no reasonable ground for the selection of the thing prohibited or regulated other than the mere caprice, whim and fancy of the legislature.

Is the prohibition of burials in cemeteries in the midst of human habitations so arbitrary an exercise of the police power that the court will declare it a mere excuse for oppression and deprivation of property? We think not. The legislative conclusion that such burials should be prohibited has the support of popular, as well as scientific belief, and is borne out by a consideration of the dangers inherent in cemeteries.

Before embarking upon a discussion of this phase of our brief we desire in passing to call attention to two facts. In the first place, burial is not an essential or necessary method of disposing of the dead. In times past cremation has been the method used, and it is a fact that cremation is becoming more and more common each day. In the second place, the prohibition in this case is a prohibition of burials; it is not a direct confiscation of cemeteries. In so far as it may act as a deprivation of the property of plaintiff, it does so incidentally only.

> "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury, does not attach under the constitution." *Chicago, B. & Q.*

R. Co. vs. *Ill.*, 200 U. S. 561, 50 L. Ed. 596, at p. 610.

However, the important point that we now desire to make is that there is a well-founded and general belief that cemeteries and burials of human bodies in the midst of populous cities or in the neighborhood of residences, are dangerous and inimical to public health. The California Court in its decision uses the following language at page 471:

> "That the interment of such bodies in the midst of thickly populated districts is likely to prove a danger to the health of the surrounding population, and as such may properly be prohibited, seems to be settled by a number of well-considered cases, cited in the opinion in the Odd Fellows' Cemetery case. (*People* vs. *Pratt*, 129 N. Y. 68, 29 N. E. 7; *Brick Presbyterian Church* vs. *Mayor*, 5 Cow. [N. Y.] 538; *Coates* vs. *Mayor*, 7 Cow. [N. Y.] 585; *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377; *Sohier* vs. *Trinity Church*, 109 Mass. 1; *City Council* vs. *Wentworth St. Baptist Church*, 4 Strob. 309; *Humphries* vs. *Front St. Methodist Church*, 109 N. C. 132, 13 S. E. 793.

The following decisions likewise recognize the dangers of cemeteries and either directly or inferentially uphold the prohibition of burials both in cities and in the neighborhood of dwellings:

> *Carpenter* vs. *Borough of Yeadon*, 158 Fed. 766;

Idem, 151 Fed. 879;
Newark vs. *Watson*, 56 N. J. Law, 667;
Palmer vs. *Cemetery*, 82 N. Y. Supp. 973;
Cronin vs. *People*, 82 N. Y. 318;
Scovill vs. *McMahon*, (Conn.), 21 L. R. A. 58;
City of Austin vs. *Austin City Cemetery Assn.*, 87 Tex. 330;
Bryan vs. *Mayor of Birmingham*, (Ala.), 45 So. Rep. 922;
Page vs. *Symonds*, 63 N. H. 17;
Young vs. *Board of Commissioners*, 51 Fed. 585;
State vs. *State Board of Health*, (N. J.), 51 Atl. 456;
Odd Fellows' Cemetery Assn. vs. *City and County of San Francisco*, 140 Cal. 226.

These decisions represent the opinions of nine state courts, two circuit courts and one circuit court of appeals. They constitute an unbroken line of decisions from 1826 down to 1908, at which time the opinion in the Carpenter case was rendered by the Circuit Court of Appeals.

In but two cases has an ordinance affecting burials within cities been declared invalid. One of these cases is the case of *Lakeview* vs. *Rose Hill Cemetery Co.*, 70 Ill. 190, an Illinois case concerning which the Illinois court in *Cemetery Assn.* vs. *R. Co.*, 121 Ill. 199, at p. 212, said:

> "In that case it was affirmatively shown that the lands were at a proper distance from the

> populous part of the city, in a sparsely settled community, and that there were but few dwellings in the vicinity. No such facts are here shown. *It was conceded that the matter of burials was a proper subject of municipal regulation.*"

The other case in which the ordinance was held invalid is *Ex parte Wygant*, 39 Ore. 429, concerning which the Supreme Court of California has said:

> "It is sufficient to say that we disapprove of that case so far as it seems to hold that the court should declare an ordinance forbidding cemeteries in a city unreasonable wherever it appears that there are vacant tracts of land several hundred acres in extent within the city limits on which cemeteries could be established." *Odd Fellows' Cemetery Assn.* vs. *San Francisco*, 140 Cal. 226, at p. 235.

To our mind, the decision in the Wygant case is incorrect; we believe that the various cases decided by the Supreme Court of the United States and heretofore cited in this case demonstrate the basic incorrectness of the Wygant case.

The language utilized in the cases cited above indicates the strength of the belief that the prohibition of cemeteries in cities is proper.

> "Clause 16 of section 2 is not of doubtful meaning. It gives boroughs incorporated under the act the power to prohibit interments altogether within the municipal limits, or to permit them within

whatever area or areas the council may see proper to designate. That such a power belongs to the state and may be delegated to its municipal agents, such as cities and boroughs is not open to question. The power of the Legislature to prohibit future interments within the limits of towns and cities was expressly recognized by the Supreme Court of Pennsylvania in *Kincaid's Appeal,* 66 Pa. 411, and in *Craig* vs. *Presbyterian Church,* 88 Pa. 42, where the whole subject of burial and removal is elaborately discussed, and the legislative power either by act of assembly directly regulating the matter, or by an act delegating the power of regulation to its municipalities is unequivocally affirmed."

Carpenter vs. *Borough of Yeadon,* 151 Fed. 879, at 882.

"Turning first to the validity of this ordinance, it is clear the power of the State of Pennsylvania to control and prohibit burials in municipalities cannot be controverted. *In Kincaid's Appeal,* 66 Pa. 423, 5 Am. Rep. 377, the Supreme Court of that state said:

" 'No one can doubt the power of the Legislature to prohibit all future interments within the limits of towns or cities. In ancient times, in Greece and Rome, such was the universal rule. It was one of the laws of the twelve tables *hominem mortuum in urbe ne sepelite neve vicinitate.* It is much to be regretted that it was not adopted as our policy at an early period. This is no invasion of any right of property. Every right, from an

absolute ownership down to a mere easement, is purchased and held subject to the restrictions that it shall be so exercised as not to injure others. Though at the time it may be remote and inoffensive, the purchaser is bound to know at his peril, that it may become otherwise, by the residence of many people in its vicinity, and that it must yield to laws for the suppression of nuisances. If conditions or covenants, appropriating land to some particular use, could prevent the Legislature from afterwards declaring that use unlawful, legislative powers necessary to the comfort and preservation of populous communities might be frittered away into perfect insignificance."

"Such a power the state may exercise through municipalities. In *Klinger* vs. *Bickel*, 117 Pa. 327, 11 Atl. 555, it was said:

"Nor can it be doubted that the Legislature may confer the same power upon municipal corporations, such as cities and boroughs. They are mere subdivisions of the state, created by the state for the comfort and convenience of the citizens dwelling therein. The state confers upon them a portion of its sovereignty for the purpose of enabling them to control their local affairs."

Carpenter vs. *Borough of Yeadon*, 158 Fed. 766, at 767, affirming 151 Fed. 879, *supra*.

"The right of the legislature to forbid a municipal corporation to appropriate its land within corporate limits to burial purposes is incontrovertible. Such enactments are not unconstitutional, either as impairing the obligation of con-

tracts or taking private property for public use without compensation; they are unassailable as an exercise of the police power."

Newark vs. *Watson*, 56 N. J. Law, 667, 29 Atl. 487, 1894.

"Whether plaintiff had an easement or a mere license it is subject to the police power of the State, which by act of assembly has authorized the ordinance of city forbidding interments at that spot. This is inherent power in the State, and is very generally exercised with the growth of towns, by forbidding further interments within city limits after a given date; otherwise a burial ground which, in the infancy of a town may be outside the limits, might continue a place of interment, to the nuisance of the city, after the cemetery has become the central point of population, and surrounded on all sides by buildings and places of business.

Humphrey et al. vs. *Board of Trustees*, 109 N. C. 132, 13 S. E. 793, at p. 794.

"Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead may all," says Chancellor Kent (2 Com. 340) 'be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the

community.' This is called the police power and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or to prescribe limits to its exercise."

Com. vs. *Alger*, 7 Cushing, 84, cited with approval in the *Slaughterhouse Cases*, 83 U. S. 36, 21 L. Ed. 394, at p. 404.

"The power of the legislature to prohibit interments in or to remove the dead from cemeteries which in the advance of urban population may be detrimental to the public health or in danger of becoming so, is not at this day a debatable question."

Went vs. *Methodist Protestant Church*, 80 Hun. 267, at 269. (1894.)

"The state may exercise the fullest control over the disposition of dead bodies with a view to protecting the public health. Under the laws of many states permits for burial and for transportation of corpses may be required. The practice of embalming has been regulated in recent years in a number of states by a system of examination and licensing. The control of cemeteries is only a further application of the control over the disposition of dead bodies. This control is often delegated to the local authorities, with power to prohibit, remove and vacate, and in some states statutes directly prohibit the establishment of new burial grounds in built up portions of cities or on lands draining into a source of water supply."

Freund, Police Powers, par. 125.

Not only, however, is the conclusion that burial in cemeteries within the city should be prohibited supported by judicial opinion, but it has the support of legislative opinion. The Congress of the United States has prohibited the laying out of any new cemeteries within the City of Washington, or in the District of Columbia within one mile and a half from the boundaries of said city. (Code of Law, D. C., p. 140, sec. 670.) Nor can any person be buried within said District except in existing cemeteries or in such cemeteries as the Commissioners of the District may authorize. (Sec. 678.) In Paris it was long ago ordained that cemeteries within the city limits must be closed. (Albert Shaw, Municipal Government in Continental Europe, p. 95.) In England cemeteries within a certain distance of a dwelling house have been prohibited. (Municipal Year Book of the Kingdom for 1909, sec. 17.)

More than twenty-five states in the United States have *specifically*, in one form or another, legislated against cemeteries and, legislated in such a way as to show that they have considered cemeteries fraught with danger to public health.

A consideration of some of this legislation demonstrates the popular belief concerning the danger of burials within a city or in the midst of human habitations.

COLORADO.

Colorado has given to its city councils power to cause cemeteries to be removed and to prohibit their

establishment within one mile of the corporation. (Statutes of Colorado (Mills), vol. 2, p. 2288.)

MASSACHUSETTS.

"Boards of Health may close any cemetery they consider necessary for the protection of the public health." (Revised Laws of Massachusetts, part 1, p. 696.)

CONNECTICUT.

Connecticut has provided that cemeteries are not to be near ice ponds. (General Statutes of Conn., Revision of 1902, p. 1070, sec. 4454.)

ALABAMA.

Alabama has given to city and town councils power to regulate private cemeteries and to prohibit them. (Political Code of Alabama, p. 618, sec. 1284.)

NEBRASKA.

The mayor and council of Omaha shall have power to prohibit the establishment of additional cemeteries within the limits of the city. (Nebraska, Cobbey's Annotated Statutes, vol. 2, sec. 7583.)

NEW JERSEY.

New Jersey (Statutes, vol. 1, p. 355, sec. 6) has made it unlawful to locate or enlarge cemeteries without the consent of the municipal authorities.

If the inhabitants of the city or town think the cemetery is objectionable, even after permit is granted by local authorities, they may apply to the State Board

of Health, which has the power to reverse the decision of the local authorities.

OHIO.

Interments in corporate limits may be prohibited by municipal corporations. (Ohio, Bate's Annotated Statutes, sec. 2550.)

WISCONSIN.

Wisconsin prohibits burials within the limits of any recorded plat of any state or village within one mile of any lot or block on which there is a building. (Wisconsin Law of 1898, sec. 1454.)

VIRGINIA.

Virginia prohibits the establishment of cemeteries within the corporate limits of any city or town. (Virginia, Pollard's Code, vol. 1, secs. 1414 to 1416.)

VERMONT.

Vermont in effect prohibits establishment of a burial ground within twelve rods of a dwelling house. (Sec. 3611 of Statutes of Vermont.)

Not only, however, has the conclusion of the legislature in this case the support of common belief, as expressed through the judiciary and the legislature, but it also has the support of scientific opinion.

Thus Sir Henry Thompson, Professor of Clinical Surgery in University College, London, says:

"What is best to be done with the dead is then

mainly a question for the living and to them it is one of supreme importance. When the globe was thinly peopled and where there were no large bodies of men living in close neighborhood the subject was an inconsiderable one and could afford to wait and might indeed be left for its solution to sentiment of any kind. But the rapid increase of population forces it into notice and especially man's tendency to live in crowded cities. There is no necessity to prove, as the fact is too patent, that our present mode of treating the dead, i. e. that of burial beneath the soil, is full of danger to the living—at present we who dwell in towns are able to escape much evil by selecting a portion of ground distant some five or ten miles from any very populous neighborhood and by sending our dead to be buried there, laying by poison, nevertheless, it is certain, for our children's children who will find our remains polluting their water sources when that now distant plot is covered, as it will be, more or less closely by human dwellings."

Popular Science Monthly, vol. 4, p. 596.

"Thus far we have considered only the dangers arising from exhumation—dangers that would be simply annihilated by the enlightened adoption of cremation. Independent even of disinterment, the infected corpse, while hidden in the grave can pursue its work of harm. In a letter from Dr. Joseph Akerly, embodied in a publication by Dr. F. D. Allen, 1822, the belief was expressed that Trinity church-yard was an active cause of the

yellow fever in New York in 1822, aggravating the malignity of the epidemic in its vicinity. During the epidemic in New Orleans in 1853, Dr. E. H. Burton reported that in the Fourth District the mortality was four hundred and fifty-two per thousand, more than double that of any other. In this district there were three large cemeteries, in which during the previous year more than three thousand bodies had been buried. In other districts the proximity of cemeteries seemed to aggravate the disease. Dr. Ranch personally observed, during the epidemic of cholera in Burlington, Iowa, in 1850, that the neighborhood of the city cemetery was free from the disease until about twenty interments had been made there, and then deaths began to occur, and always in the direction from the cemetery in which the wind blew. During the prevalence of the plague in Paris in the beginning of the eighteenth century, the disease lingered longest in the neighborhood of the Cimetiere de la Trinite, and there the greatest number fell a sacrifice. In a report presented to both Houses of the British Parliament, in 1850, Dr. Sunderland testified that he had witnessed several outbreaks of cholera in the vicinity of grave-yards, which left no doubt on his mind as to the connection between the disease and such local influences."

North American Review, vol. 135, p. 266, at p. 272.

In Buck's "Hygience and Public Health," volume 2, we find the question of cemeteries treated under the

title "Those nuisances which are nuisances on account of the danger of infection connected with them." The various scientific authorities on the question are quoted *pro* and *con* and in conclusion the author finds the following:

> "In order to provide against any possible danger from buried bodies cemeteries should always be located at a distance from dwellings. In almost all civilized countries it is now the practice to bury the dead outside the city limits—the true way of abolishing forever the nuisance of cemeteries is to burn the dead and either to spread their ashes over the fields, as suggested by Sir Henry Thompson, or preserve them in columbaria." (p. 460.)

> "Though not so deleterious as the miasmata generated by the decay of vegetable matter, the changes produced in the grave are fraught with danger to the surviving, from the escape of mephitic vapors. Particularly is this the case in a crowded graveyard, bordered by a dense population. The ancient nations placed their dead at a distance from their temples and their homes, chiefly for religious purposes; and they did wisely. It was reserved for Christianity to attach a false importance to holy ground, and to the vicinity of the church, and to bury the dead at their very doors. Thus the public health gradually suffered, and hygienic guardians of the community were driven to enact stringent laws, in all large cities, prohibiting intramural interments, or burial in church vaults.

"It would appear from the experience at Paris in removing some fifteen thousand dead bodies from the Cimitiere des Innocens, that while the positive and immediate danger to the workmen was small, it was chiefly in removing the recently interred corpses, and those not far advanced in decomposition, that the worst results were experienced. Those who respired the vapor emanating from such remains, fell instantly, asphyxiated, and died; while those at a greater distance were affected with nausea, vertigo, or syncope, lasting for some hours. This vapor appeared to be sulphuretted hydrogen mixed with carbonic acid. Though the former is a very offensive and poisonous gas, it was mainly to the latter that the fatal accidents were due."

North American Review, July-Oct., 1861, vol. 93, p. 131.

However, as a matter of fact, were this a question presented to this Court *de novo*, we are convinced that the Court, after a consideration of the thing prohibited, would determine the question in favor of the validity of the ordinance.

A human body, when once placed in the earth, becomes a thing fraught with danger and menace to the living. It becomes a nuisance because of the odors that may emanate from it. It becomes a danger because of the gases that are given off by it, and because of the fact that the germs that were located in the body, survive after the death of the person, being brought to the surface, and from there into contact

with living persons. The following is the evidence introduced in the case of *Lowe* vs. *Prospect Hill Cemetery Association,* 46 L. R. A. 240:

> "The evidence in behalf of both parties to this controversy shows, without conflict, that contagious and infectious diseases such as typhoid and scarlet fevers and diphtheria are caused by the presence in the system, blood, stomach of the human, of infinitesimal microscopic microbes, germs, living organisms; that on the death of the human these germs multiply and reproduce themselves in countless numbers; that in the grave they flourish in the liquids of the decomposing body; that they live and flourish in any moisture; that they live for an indefinite length of time; that they become inactive when exposed to a condition of dryness, but upon coming in contact with moisture their activity revives; that some classes of these germs live in oxygen, some cannot live in that gas, and that some live either in or out of it; that such a soil as that underlying the cemetery in controversy is not a germicide—that is, that the germ is not destroyed by coming in contact with that soil; that moisture sinking and seeping into the pores of the earth will carry these germs, living and active, from graves, for considerable distances; that, if moisture containing these germs seeps into a well, the germs will communicate to persons using the water the disease of which the body died from whence the germ sprang,—if the body died of consumption, the germ is a consumptive one, and will communicate that disease, and if the body died of diphtheria, the germ is a diphtheretic one, and will

communicate that disease; that the substances best adapted for the transmission of these germs to the human are water and milk; that so infinitesimal and so persistent are these germs that if vessels be rinsed in well water infected with them, and then used for milk, they will or may be present in the moisture on the sides or bottom of the vessel, and thus get into the milk and communicate to one drinking it the disease of which they are the product.

"There is a sharp conflict in the evidence on this question, namely, whether these germs were likely to or would probably be carried by the liquid of the decomposing bodies and other moisture seeping into the graves, and thence sinking into the earth from the graves to the wells of appellees; the nature of the soil, the contour of the cemetery grounds, the quantity of liquid matter set free by decomposing human bodies, and the annual precipitation of moisture considered. The evidence shows that about 80 per cent of human body is liquid, and that the annual precipitation of moisture is 23 inches plus; and experiments show that soil which has been cultivated or dug up will absorb nine or ten times the amount of the moisture which falls upon it that the unbroken sod will. Sketches of the Physical Geography and Geology of Nebraska, by Aughey, p. 45. The witnesses for appellant gave it as their opinion that these germs were not likely or would not find their way from the graves to the wells. The witnesses of appellees were of the contrary opinion. The district court adopted the opinion of appellees' witnesses. We cannot say that it erred in this. Indeed, we

think it did not. The evidence showed that some years before this trial occurred such diseases as typhoid and scarlet fever and diphtheria were more prevalent in the vicinity of what is now the old cemetery than elsewhere in the City of Omaha; that the families afflicted with those diseases used water from wells; and an eminent physician testified that, in his opinion, such diseases were communicated by germs which had found their way from the old cemetery to the wells."

Lowe vs. *Prospect Hill Cemetery Association*, 46 L. R. A. 241, 58 Neb. 94.

Not only are germs conveyed from the buried dead body to living beings by means of water and by means of the gaseous emanations from the body, but as discovered by Pasteur, germs, capable of carrying diseases of various kinds may be brought to the surface of the soil by worms, by rats, mice, moles, ants and other burrowing creatures. Stevenson and Murphy, "A Treatise on Hygiene and Public Health," volume 2, page 697, under caption "Burial Grounds Are Offensive."

It is a fact, of course, that most burials are now made in coffins. But in the first place, the inclosure of the bodies in coffins simply prolongs or delays decomposition by cutting off the access of oxygen and moisture to the body, thus making the body an actual menace for a longer time.

"By putting the body in the grave, we thwart the process of restitution; by using coffins and

lead, we go still further in the way of detention. We make more and more deficient the air in contact with the decaying matter, and the decay passes into putrefaction, and putrid smells arise."

Stevenson and Murphy, "A Treatise on Hygiene and Public Health," vol. 2, p. 698.

In the second place, coffins are by no means a sure method of preventing the body from coming into contact with the earth and the various agencies for the distribution of germs.

"Lead coffins which are usually hermetically sealed, exclude external influences; but if there has been sufficient moisture in the body to allow for the progression of the putrefaction to a well-marked point, the gases developed in the body may be sufficient to burst open the coffin and then putrefaction may go on slowly, but following the same laws as in other cases."

Wharton & Stille's Medical Juris., vol. 3, par. 409b.

In a city of limited area the danger from the cemetery is particularly great, first, because of the proximity of people, and, second, because of the fact that the growth of the city may at any time demand the use of cemetery lands for dwelling purposes and make the consequent exhumation of the bodies necessary.

The exhumation of bodies in a cemetery is, however, a matter fraught with danger to the community.

"Eassie gives many examples of this. The re-

appearance of the plague at Modena in 1828 is said to have been due to an excavation made in some ground in which the victims of the plague had been interred some three hundred years before. The excavation for sewers in the site where the victims of the plague in 1665 were buried increased the virulence of the cholera in London in 1854. The authorities had been warned of this probable result by Mr. Simon. Dr. Playfair states that the fever prevalent in Rome is due to the exhalation from the soil which is saturated with organic matter. In 1843 when the Parish Church of Minchinhampton was rebuilding, the soil of the burial ground, or what was superfluous, was disposed of for manure and deposited in many of the neighboring gardens. The result was that the town was nearly decimated."

Buck's "Hygiene and Public Health," vol. 2, p. 459.

"The sanitary records of nearly every nation show the force of the doctor's questions, and illustrate the danger of which he speaks. In 1828 Professor Bianchi demonstrated how the fearful reappearance of the plague at Modena was caused by excavations in ground where, three hundred years previously, the victims of the pestilence had been buried. Mr. Cooper, in explaining the causes of some epidemics, remarks that the opening of the plague burial grounds at Eyam, in Derbyshire, occasioned an immediate outbreak of disease. He also describes how the malignity of the cholera, which scourged London in the year 1854, was enhanced by the excavations made for sewers

in the soil where in 1665 those dying from the plague were buried. Mr. Simon had predicted this result, and warned the authorities of the danger of disturbing the spot. Mr. Eassie, in his splendid work on 'The Cremation of the Dead' tells us that in 1843, when the parish church of Minchinhampton was rebuilding, the soil of the burial ground, or what was superfluous, was disposed of for manure, and deposited in many of the neighboring gardens. As a result the town was nearly decimated; and the 'Sanitary Record' adds, 'the same would have occurred, one would imagine, even if the coffin-earth had been absent."

"As high scientific authority is seldom called on to discover the origin of local diseases unless it assumes a malignant or epidemic type, it is safe to believe that thousands of cases of illness and death are occasioned by the disinterment of human remains, without the true cause of the malady being suspected. When grave-yards are dug up, who is there to look into the distant past and say: This man died of small-pox, pass him by; and that one of the cholera, disturb him not. Remembering that, a few years since, the yellow fever for two successive summers ravaged the South, how strong is the presumption that the second epidemic was largely occasioned by the burial of the victims of the first. During the reign of terror that existed, men dropped like leaves, and, insecurely coffined, were hurried to common and shallow graves. Sometimes in the country districts they were buried almost where they fell, and judging the future by what has been demonstrated in the past, it seems inevitable that visitations of this

frightful malady will yet sweep sections of the country, caused from the disturbance of infected burial spots, by coming generations ignorant of their contents."

North American Review, vol. 135, p. 266, at p. 272.

From the very earliest times (even among the early Jews) the location of cemeteries without the cities was considered necessary.

"For practical reasons people began quite early to locate tombs outside the cities and graves came to be regarded as ceremonially impure."

The New Sharfi Herzog Enc. of Religious Knowledge, vol. 2, p. 308.

"Innumerable proofs, furnished by scientific men of all ages, recently by the French doctor, Pasteur, show that earth retains, instead of destroying, the germs of disease contained in a body and that in some degree it will vitiate its surroundings.

"Since Hannibal's army was decimated by effluvia from an ancient graveyard he unwittingly demolished, history has repeated itself. The cholera in London in 1854 was ascribed to the upturning of earth where victims of a previous plague had been buried.

"The French Academy of Medicine located the origin of diseases of the lungs and the throat in putrid emanations from the Parisian cemetery "Pere la Chaise." * * * Doctor Domingo Freire found in cemeteries of Rio de Janiero myriads of microbes in corpses, identical with those

in persons stricken with yellow fever, a year after burial."

North American Review, vol. 167, p. 211, at p. 221.

Before closing, we desire to call attention to certain facts, judicial notice of which will be taken by the Court, and a consideration of which may be of value in this case.

The Court takes judicial notice of the fact that San Francisco is a city of limited area, being quite a little less than seven miles square; that a large portion of this area is already covered with buildings; that the city is rapidly increasing in population, and that the cemetery in question is in the midst of the city and surrounded by dwellings.

Odd Fellows' Cemetery Assn. vs. *City and County of San Francisco,* 140 Cal. 226.

The Court furthermore takes judicial notice of the fact that the City and County of San Francisco is surrounded by water on three sides, giving to it possibilities of extension in one direction only. Incidentally the City and the County are territorially one and the same. We have, in other words, a county for governmental purposes only. The Court knows as a matter of fact that, though a City and County for governmental purposes, the City and County of San Francisco *is* in reality a municipality or city. Its popula-

tion is and always will be an urban population. The Court knows, therefore, that its inhabitants live and will continue to live in the close proximity characteristic of city populations, not in the scattered condition characteristic of country or county populations.

The legislature of the State of California in 1873 undoubtedly recognized these facts when it enacted Section 297 of the Penal Code forbidding interment of dead bodies of any human beings, in any place within the corporate limits "of any city or town of this state, or within the *corporate limits of the city and county of San Francisco,*" etc. To the mind of the legislature, as early as 1873, the possibilities of danger from burials in the City and County of San Francisco were the same as in any other city or town in the state. The legislature, in other words, recognized the fact that San Francisco, in reality is a city, though called a city and county; that its population, as we have already said, is an urban one.

In conclusion, then, we would state that we are convinced of the validity of the ordinance in this case. As we have just seen, the prohibition of burials in San Francisco is not novel, nor is it the result of any sudden conclusion on the part of the legislature.

We believe that the legislative action in this case was proper. We believe that it was a reasonable exercise of the police power, first, from the standpoint of public health and safety, second, from a consideration of the demands of the future growth and prosperity of the city.

If there were large tracts of lands existent in the City and County of San Francisco which the owners desired or were willing to use for cemetery purposes, and which were unoccupied, suitable for cemetery purposes, removed from the presence of human beings and from all sources of water and food supply, we believe that the ordinance in this case, taking into consideration the future growth of San Francisco, would still be proper.

However, as we have shown, in the first place, the complaint does not show the existence of such a condition of affairs; in the second place, the presence or absence of large tracts of land removed from human habitations, is immaterial in this case. The plaintiff's cemetery is in the midst of human habitations and public thoroughfares, and therefore, the only question in the case is the reasonableness of burials in such cemeteries.

We believe that we have demonstrated that such a prohibition is reasonable. We believe that we have demonstrated this by showing the dangers or possibilities of danger inherent in the burial of human bodies within a city. We believe that we have furthermore demonstrated it, to such an extent at least as to make it conclusive upon the Court, by showing the common opinion and general belief in the dangers of interment of human bodies within a city.

The Circuit Court in the case of *Hume* vs. *Laurel Hill Cemetery*, 142 Fed. 552, did declare the ordinance invalid. The opinion of the Circuit Court, however, we submit, with all due deference, is incorrect. If the principles of law heretofore laid down by us are correct, and of this we feel there is no doubt, then the Hume case is undoubtedly incorrect. It is difficult, in reviewing the Hume case, to determine upon just what ground the Court decided that case. From a close reading of the case, however, we are convinced that the following language correctly sets forth the opinion of the Court, and shows wherein the opinion of the Circuit Court differs fundamentally from the opinion of the Supreme Court of the State of California.

> "An ordinance which arbitrarily prohibits the burial of bodies within an entire county, embracing large tracts of land unoccupied and remote from human habitation, where the public health and safety cannot possibly be endangered, is clearly unreasonable and void. * * * If the cemetery in question has never been, and will not become, a nuisance, and is not dangerous to life or detrimental to the public health, it is not within the constitutional powers of the municipality to suppress it." *Hume* vs. *Laurel Hill Cemetery*, 142 Fed. 552, at p. 564.

In other words, the Circuit Court was influenced in its opinion by a consideration of the fact that there were large, unoccupied tracts of land in the City and

County of San Francisco. It also considered the fact that plaintiff's cemetery has not been, and according to the complaint will not be, a nuisance.

It seems to us that the Circuit Court dealt with this ordinance as it would have dealt with a summary act suppressing plaintiff's cemetery on the ground that it was a nuisance, rather than as an ordinance applying to cemeteries throughout the city because of their usual or possible dangerous tendencies.

In the Hume case, furthermore, we think that the Court unduly limited the police power of the legislative body. The Court seems inclined to think that the police power should extend only to such things as are nuisances *per se*, or as are actually at the time of prohibition harmful. In the Hume decision, furthermore, we think the Court substituted its conclusion for the conclusion of the legislature. Without declaring in what way regulation instead of prohibition would meet the evils attendant upon burials in a city, the Court declares that regulation instead of prohibition should have been provided for by the legislature. The Court in the Hume case certainly did not place itself in an attitude of sympathy with the actual condition of facts in the City and County of San Francisco; it did not take judicial notice of the facts to which in this brief we have called the attention of this Court.

We submit that the decision of the State Court upholding the ordinance in this case is correct; the decision of the Federal Court incorrect. And we ask,

therefore, that this Court give to the opinion of the State Court the weight and dignity that will belong to it from an affirmation by this Court.

Respectfully submitted.

PERCY V. LONG,
City Attorney,

JESSE H. STEINHART,
Assistant City Attorney,

Attorneys for Defendants in Error.

LAUREL HILL CEMETERY *v.* CITY AND COUNTY OF SAN FRANCISCO.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 100. Argued January 21, 24, 1910.—Decided February 21, 1910.

Great caution must be exercised by any tribunal in overruling, or allowing to be overruled, the decision of the local authorities on questions involving the health of the neighborhood; and this court is doubly reluctant to interfere with deliberate decisions of the highest court of a State confirming a specific determination on such a question previously reached by the body making the law.

Where opinion is divided as to whether a practice prohibited by a police ordinance is dangerous, and if the ordinance be valid if the danger be real, this court will not overthrow the ordinance as an unconstitutional deprivation of property without due process of law or a denial of equal protection of the law merely because of adherence to the other belief. *Jacobson* v. *Massachusetts*, 197 U. S. 11.

One not belonging to a class, cannot raise the question of constitutionality of a statute as it affects that class.

Tradition and habits of the community count for more than logic in determining constitutionality of laws enacted for the public welfare under the police power.

An ordinance prohibiting burial of the dead within the limits of a populous city based on a determination of the city authorities that the practice is dangerous to life and detrimental to public health, and which has been sustained by the highest court of the State, will not be overthrown by this court as an unconstitutional exertion of the police power of the State; and so held as to such an ordinance of San Francisco, California.

152 California, 464, affirmed.

THE facts are stated in the opinion.

Mr. Thomas E. Haven for plaintiff in error:

The ordinance is invalid because it goes beyond the necessities of the case.

The determination by legislative bodies as to the necessity of the exercise of the police power is not final nor conclusive

Welch v. *Swasey*, 214 U. S. 91; *Chicago, B. & Q. R. R.* v. *Illinois*, 200 U. S. 592; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Hannibal & St. Joseph R. R. Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313.

The prohibition of burials from which no injury can result is neither reasonable nor necessary.

The Supreme Court of California has held that an ordinance prohibiting burials in an entire county is unreasonable and void. *Los Angeles* v. *Hollywood Cemetery Association*, 124 California, 344; *Hume* v. *Laurel Cemetery*, 142 Fed. Rep. 564–565; Freund on Police Powers, § 178; *Lake View* v. *Letz*, 44 Illinois, 81.

Courts cannot know judicially that the burial of human remains in proximity to the habitations of the living is dangerous to the health of the inhabitants. *Brown* v. *Piper*, 91 U. S. 37.

When authorities differ as to scientific facts, courts cannot take judicial knowledge of them. *St. Louis Gas Light Co.* v. *American Fire Ins. Co.*, 33 Mo. App. 367 369; Underhill on Evidence, § 241, p. 371; *Minnesota* v. *Barber*, 136 U. S. 313.

That cemeteries are not so dangerous to health as to constitute nuisances *per se* has been held by the Supreme Court of California and numerous other authorities. *Los Angeles* v. *Hollywood Cemetery Association*, 124 California, 347; *Lake View* v. *Letz*, 44 Illinois, 81; 5 Am. & Eng. Ency. of Law (2d ed.), 791; *Monk* v. *Parkard*, 71 Maine, 309; *Lake View* v. *Rose Hill Cemetery*, 90 Illinois, 195; *Begein* v. *City of Anderson*, 28 Indiana, 79; *Kingsbury* v. *Flowers*, 65 Alabama, 485; Wood on Nuisances (2d ed.), p. 6, § 3; *Dunn* v. *City of Austin*, 77 Texas, 139, 146; *Musgrove* v. *St. Louis Church*, 10 La. Ann. 431; *New Orleans* v. *St. Louis Church*, 11 La. Ann. 244; *Ellison* v. *Commissioners*, 5 Jones' Equity, 57.

Scientific authorities quoted in the brief and in the record, including article by M. J. Robinet, in Popular Science Monthly, September, 1881, Vol. 19, p. 657, establish the scientific fact that whatever unhealthy conditions have heretofore arisen

from cemeteries, have been due to the improper or negligent conduct of the same, rather than to any inherent danger resulting from burials when properly conducted.

Prohibition of burials is unreasonable and beyond the necessities of the case, if possible dangers can be avoided by regulation of burials without absolute prohibition. *Los Angeles* v. *Hollywood Cemetery Association*, 124 California, 349; Freund on Police Power, p. 132, § 141. See report of the Connecticut board of health containing a discussion of the regulation of cemeteries, and Political Code of California regulating manner of burial of human remains, §§ 3012, 3025, 3027; Acts of California, April 1, 1878, p. 1050; 1889, p. 139; Deering's Gen. Laws, Act 545, p. 83; Henning's Gen. Laws, p. 505; provisions of Penal Code as to removal of dead bodies without permit, §§ 290–291.

The police power vested in the Board of Supervisors of San Francisco is a power to abate nuisances and to regulate such occupations as are nuisances.

Whenever threatened danger can be removed by restrictions, or regulations, without entire prohibition, the latter course is manifestly oppressive, unreasonable and invalid. 24 Am. & Eng. Ency. of Law (2d ed.), pp. 243–244; *Ex parte Patterson*, 42 Texas Crim. Rep. 256; *McConvill* v. *Jersey City*, 39 N. J. Law, 44; *City of Austin* v. *Austin Cemetery Assn.*, 87 Texas, 330; *Re Hauck*, 70 Michigan, 390; *State* v. *Mott*, 61 Maryland, 297; *Re Frazee*, 63 Michigan, 396.

A mere tendency to endanger the health of the public is not a sufficient warrant for the prohibition of a lawful business. *Lake View* v. *Rosehill Cemetery Company*, 70 Illinois, 191; *Miller* v. *Horton*, 152 Massachusetts, 540; *Lochner* v. *New York*, 198 U. S. 45.

Complainant is entitled to be heard upon the question as to whether or not burial of the dead within San Francisco is dangerous to life and detrimental to the public health. *Dobbins* v. *City of Los Angeles*, 139 California, 179; *Re Smith*, 143 California, 372–373.

The ordinance is unreasonable for the reason that it prohibits burials upon large unoccupied tracts of land. *Wygant* v. *McLauchlan*, 39 Oregon, 429.

The ordinance deprives complainant and its lot owners of their property without due process of law.

The means are unreasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *Lawton* v. *Steele*, 152 U. S. 137; *Holden* v. *Hardy*, 169 U. S. 398.

The question as to whether or not modern cemeteries are dangerous to the health of neighboring inhabitants has never been considered or determined by any court.

The cases cited in the courts below, while sustaining prohibition of burials in cities as a proper exercise of the police power have been based on the mere assumption and not the actual finding of any danger.

Mr. Jesse H. Steinhart, with whom *Mr. Percy V. Long* was on the brief, for the defendant in error:

The San Francisco Burial Ordinance has been twice sustained by the courts of California. *Laurel Hill Cemetery* v. *San Francisco*, 152 California, 464; *Odd Fellows' Assn.* v. *San Francisco*, 140 California, 226; and in each case held to be within the powers conferred upon the municipality.

The ordinance is constitutional under the Fourteenth Amendment. Complainant cannot complain on behalf of persons owning large tracts of land which might be used for cemetery purposes as it does not belong to that class. *Brown* v. *Ohio Valley R. R.*, 79 Fed. Rep. 176; *Clark* v. *Kansas City*, 176 U. S. 114; *Pittsburg & C. R. R.* v. *Montgomery*, 39 N. E. Rep. 582; *Austin* v. *Boston*, 7 Wall. 694.

The police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. And this ordinance falls within that definition. *C., B. & Q. R. R.* v. *Illinois*, 200

U. S. 561; *Escanaba Transp. Co.* v. *Chicago*, 107 U. S. 678; *Leisy* v. *Hardin*, 135 U. S. 100; *Holden* v. *Hardy*, 169 U. S. 366; *Welch* v. *Swasey*, 214 U. S. 91; *Gundlin* v. *Chicago*, 177 U. S. 183.

The court should not declare the act unconstitutional because a statute ordains a complete prohibition of the act or thing legislated against instead of a regulation thereof. *Powell* v. *Pennsylvania*, 127 U. S. 678.

The judiciary cannot declare the act unconstitutional merely because it prohibits harmless things and harmless acts as well as harmful things and harmful acts. *Booth* v. *Illinois*, 184 U. S. 425.

The court will not declare an ordinance unconstitutional merely because the court itself knows or feels that the legislative conclusion as expressed in the enactment is incorrect, when as a matter of fact, the legislative conclusion is supported by public opinion, commonly held belief, or scientific authority. *Austin* v. *Tennessee*, 179 U. S. 343.

The prohibition in this case is a prohibition of burials; it is not a direct confiscation of cemeteries. In so far as it may act as a deprivation of the property of plaintiff, it does so incidentally only; as to the danger of cemeteries and for upholding prohibition of burials in cities and settled neighborhoods, see *Carpenter* v. *Yeadon*, 158 Fed. Rep. 766; *Odd Fellows' Cemetery Assn.* v. *San Francisco*, 140 California, 226.

Of the cases holding such ordinance invalid some can be distinguished and others are erroneous. *Lake View* v. *Rosehill Cemetery*, 70 Illinois, 190; *Cemetery Assn.* v. *Railway Co.*, 121 Illinois, 199; *Ex parte Wyant*, 39 Oregon, 429; *Commonwealth* v. *Alger*, 7 Cushing, 84; *Went* v. *Methodist Church*, 80 Hun, 267; Freund, Police Powers, par. 125; *Lowe* v. *Prospect Hill Cemetery*, 46 L. R. A. 240.

More than twenty-five States in the United States have specifically, in one form or another, legislated against cemeteries and, legislated in such a way as to show that they have considered cemeteries fraught with danger to public health.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to restrain the City and County of San Francisco and its officers from enforcing an ordinance forbidding the burial of the dead within the City and County limits. The allegations of the complaint are lengthy, but the material facts set forth are as follows: The plaintiff was incorporated in 1867 as a rural cemetery under a general act. The land in question had been dedicated as a burying ground, being at that time outside the city limits and a mile or two away from dwellings and business. It was conveyed to the plaintiff, and later a grant of the same was obtained from the city in consideration of $24,139.79, which sum the city retains. The land has been used as a cemetery ever since; forty thousand lots have been sold and over two million dollars have been spent by the lot owners and other large sums by the plaintiff in preparing and embellishing the grounds. By the terms of the above-mentioned general statute the lots, after a burial in them, are inalienable and descend to the heirs of the owner, and the plaintiff is bound to apply the proceeds of sales to the improvement, embellishment and preservation of the grounds. There is land still unsold estimated to be worth $75,000. There now are many dwellings near the cemetery, but it is alleged to be in no way injurious to health, or offensive, or otherwise an interference with the enjoyment of property or life. There also is an allegation that there are within the city large tracts, some of them vacant and some of them containing several hundred acres, in several of which interments could be made more than a mile distant from any inhabitants or highway. The ordinance in question begins with a recital that "the burial of the dead within the City and County of San Francisco is dangerous to life and detrimental to the public health," and goes on to forbid such burial under a penalty of fine, imprisonment, or both. The complaint sets up that it violates Article I. § 8, and the Fourteenth Amendment of the Constitution of the United States.

The answer denied some of the above statements on the ground of ignorance, and categorically denied the averment as to the large vacant tracts available for burying within the city. The defendants moved for judgment on the pleadings, the notice showing the ground to be that the complaint did not state a cause of action, but going on to say that the motion would be made upon all the papers on file. The motion was granted and an exception to the judgment was affirmed by the Supreme Court of the State. 152 California, 464. As the state court and the arguments before us assumed the material allegations of the complaint to be true, we shall assume that the judgment was ordered upon the complaint without regard to the denials in the answer, although it was then on file.

The only question that needs to be answered, if not the only one before us, is whether the plaintiff's property is taken contrary to the Fourteenth Amendment. In considering it, the allegation as to the large tracts available for burying purposes may be laid on one side. The plaintiff has no grievance with regard to them. *The Winnebago*, 205 U. S. 354, 360. Moreover, it is said by the Supreme Court of the State that burial within the San Francisco City or County limits already was forbidden by statute, except in existing cemeteries or such as might be established by the Board of Supervisors. The Board of Supervisors passed the ordinance now complained of; so that, as pointed out by the court, the ordinance in effect merely prohibited burials in existing cemeteries. It was, therefore, a specific determination by the lawmaking authority as to the relation of those cemeteries to their respective neighborhoods, and the question is whether the court can say that it was wrong.

To aid its contention and in support of the averment that its cemetery, although now bordered by many dwellings, is in no way harmful, the plaintiff refers to opinions of scientific men who have maintained that the popular belief is a superstition. Of these we are asked, by implication, to take judicial

notice, to adopt them, and on the strength of our acceptance to declare the foundation of the ordinance a mistake and the ordinance void. It may be, in a matter of this kind, where the finding of fact is merely a premise to laying down a rule of law, that this court has power to form its own judgment without the aid of a jury. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 227. But whatever the tribunal, in questions of this kind, great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins* v. *Los Angeles*, 195 U. S. 222. *Lochner* v. *New York*, 198 U. S. 45, 58 *et seq.* But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the State whose people are directly concerned. *Welch* v. *Swasey*, 214 U. S. 91, 106. The reluctance must be redoubled when as here the opinion of that court confirms a specific determination concerning the same spot previously reached by the body that made the law. See *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 341; *Smith* v. *Worcester*, 182 Massachusetts, 232, 234, 235.

But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this Bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *S. C.*, 183 Massachusetts, 242. See

Otis v. *Parker*, 187 U. S. 606, 608, 609. Again there may have been other grounds fortifying the ordinance besides those recited in the preamble. And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World. This is shown sufficiently by the cases cited by the court below: e. g. *Coates* v. *New York*, 7 Cow. 585. *Kincaid's Appeal*, 66 Pa. St. 411. *Sohier* v. *Trinity Church*, 109 Massachusetts, 1, 21. *Carpenter* v. *Yeadon*, 158 Fed. Rep. 766; *S. C.*, 86 C. C. A. 122. The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own State uphold.

Judgment affirmed.

MR. JUSTICE MCKENNA took part in the decision of this case.